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In The

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1050

KOHLER CO., Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

GILBERT J. HELWIG
PAUL J. WEISCHER
REED, SMITH, SHAW & McCLAY
Attorneys for Petitioner

747 Union Trust Building
P. O. Box 2009
Pittsburgh, Pa. 15230

Of Counsel,
LUCIUS P. CRANE
Kohler, Wisconsin 53044

SOUTH SIDE L.P. PRINTERS, 900 SECOND AVENUE, PITTSBURGH, PA. 15219

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner Kohler Co. prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Third Circuit entered at No. 18, 182 on September 22, 1970 affirming the judgment of conviction entered against Petitioner by the United States District Court for the Western District of Pennsylvania at Criminal Action No. 66-295.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit affirming Petitioner's conviction has not yet been reported. A copy of the Opinion of the Court, including the dissenting Opinion of Judge Aldisert, is appended hereto in Appendix A.

Questions Presented for Review

JURISDICTION.

The judgment of the Court of Appeals affirming Petitioner's conviction was entered on September 23, 1970, and is printed in Appendix B hereto. Petitioner's application for rehearing, filed on October 7, 1970, was denied on November 3, 1970.

Section 1254(1) of 28 U.S.C. confers jurisdiction on this Court to review the judgment of the Court of Appeals by Writ of Certiorari.

QUESTION PRESENTED FOR REVIEW.

Where a corporation, charged with violating the antitrust laws because its sales manager allegedly met with representatives of competitors during social gatherings and agreed to fix prices, contended that no such agreements had been made known to or followed by the company and would have been beyond its sales manager's authority, in violation of company instructions, and contrary to its economic interests; was the corporation denied a fair opportunity to have the jury pass upon the factual and legal questions presented by the issue of its vicarious responsibility for the actions of its sales manager because:

(a) The Trial Court limited the Defendant's economic evidence to the indictment period and refused to allow the Defendant to put in evidence its written instructions to its sales manager concerning the company's policy of antitrust compliance and non-fraternization with competitors;

(b) The prosecutor pursued an inflammatory line of cross examination about an old labor dis-

pute (i) which predated the conspiracy period; (ii) which the Government conceded was not relevant to the price fixing charges; and (iii) which the Court of Appeals agreed should have been terminated by the Trial Judge although disagreeing on the abiding nature of the resultant prejudice; and

(c) The charge to the jury on the issue of a corporation's criminal responsibility for the acts of its employees was inadequate and erroneous.

CONSTITUTIONAL PROVISION INVOLVED.

The constitutional provision involved is the due process clause of the Fifth Amendment of the United States Constitution, which provides as follows:

"No person shall . . . . . be deprived of life, liberty, or property, without due process of law; . . . . . "

STATEMENT OF THE CASE.

In October 1966 an indictment was returned in the Western District of Pennsylvania charging that during the period from September 1962 through sometime in 1966, eight plumbing fixture manufacturers had conspired to "raise, fix, stabilize and maintain the prices of enameled cast iron and vitreous china plumbing fixtures." Also named as defendants in the indictment were five individual employees of certain of the corporate defendants and the Plumbing Fixture Manufacturers Association, the industry's trade association. Five of the manufacturers, five of the individual defendants, and the trade association entered pleas of nolo contendere in the fall of 1968 and were sentenced thereon. The remaining defendants, including the Petitioner, entered pleas of not guilty. After a jury trial which began on January 13, 1969 and ended on May 2, 1969, verdicts were returned finding all defendants guilty of violating Section 1 of the Sherman Antitrust Act. Judgments of conviction were entered on August 12, 1969, and appeals were taken by all defendants to the Court of Appeals for the Third Circuit which affirmed the convictions on September 23, 1970. Petitioner's request for rehearing was refused on November 3, 1970.[1] (See Appendix C)

The Government's evidence at trial established that a number of changes in the published prices which were announced by various of the manufacturers of plumbing

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1. The five other defendants who were convicted — American-Standard, Inc., Borg-Warner Corp., Joseph J. Decker, Daniel J. Quinn, and Norman R. Held — have also applied to this Court for review on certiorari. Many, if not all, of the points raised in such petitions would support a request for certiorari in this case, but are not here argued to avoid needless duplication.

fixtures in the period from the fall of 1962 to the summer of 1963 had been preceded by gatherings of various individuals employed by plumbing fixture manufacturers at which price increases were discussed and agreed to. These gatherings occurred on the occasion of meetings of the Plumbing Fixture Manufacturers Associations, but the conversations at which the price fixing agreements were allegedly entered into took place at cocktail parties or other informal gatherings which preceded or followed the formal meetings of the trade association. One of the persons said to be present at least at some of the gatherings was Norman R. Held, sales manager of Kohler Co. in the period covered by the testimony.

While Kohler, throughout these proceedings, has firmly denied that its sales manager entered into any agreements to fix or stabilize prices, and questioned the sufficiency of the evidence to support his conviction, Kohler also defended vigorously on the ground that it would have been beyond his authority and against his employer's interests for Held to have done so. One of Kohler's principal complaints in its appeal to the Court of Appeals for the Third Circuit and in this Petition is that it was never given a fair opportunity to have this defense seriously considered by the jury.

To flesh out its defense that such acts by its sales manager, if they had occurred, should not visit criminal responsibility on the company, Kohler sought to establish that such acts were beyond the authority of its sales manager; that what was done was not in the course of his employment; that it could not have been in the company's interest; that it violated well-publicized company policy against fraternizing with competitors; and no

such agreements were ever made known to the persons within the company who actually set the company's published prices and that the company's prices (both published and realized) were the product of competitive market forces.

Kohler's efforts to show that it was serious about its antitrust compliance and non-fraternization policies and that its employees, including Held, must have understood this, were frustrated by the court's limiting evidentiary rulings. Thus, Kohler sought to show that the Company's General Counsel had addressed a 1959 meeting of its sales employees at which Norman Held was present and made an extensive presentation concerning the Company's antitrust compliance policies. The court sustained the Government's objections that such testimony was hearsay. The court refused to receive in evidence a document setting forth the Company's antitrust compliance policies which had been widely distributed in the spring of 1961 among the Company's sales personnel, including Held, on the occasion of the wide publicity which attended the electrical industry anti-trust convictions.[2] The prejudice to Kohler of the court's action in rejecting this evidence was intensified by the judge's deprecating comments about the value of the oral testimony concerning the Company's antitrust compliance policies which Kohler was allowed to introduce.

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2. There was also testimony that in the period from 1961 to 1966, the document was frequently used as the basis for presentations given by representatives of the company's legal department at meetings and training sessions of the company's sales personnel, branch managers, and others.

To lend support to its defense that its price changes were in fact made without any knowledge of any such agreements, Kohler offered the testimony of Dr. Theodore Beckman, an eminent economist and marketing expert who had made an intensive study of Kohler's prices (both published and realized), its costs, the growth of its market share throughout the period of the alleged conspiracy, and other relevant factors and had concluded that it was "inconceivable" that its prices were the product of anything other than extremely competitive free market forces. While the court allowed Dr. Beckman to testify at length concerning his studies and conclusions, the court restricted documentary and graphic support of his testimony to the four year period covered by the indictment on the theory that any economic evidence before or after the indictment period was irrelevant. The Court of Appeals concluded that this ruling, while erroneous, was not prejudicial because his oral testimony supplied the substance of the material excised by the ruling.

Kohler also offered evidence concerning its actual practices with respect to discounts[3] which showed that throughout the period of the alleged conspiracy, it regularly and frequently granted discounts far beyond the limits allegedly agreed to. To illustrate and confirm testimony to this effect, Kohler sought to introduce an exhibit which summarized almost 700 examples in 1963 alone where Kohler had quoted specific job discounts which went beyond the alleged maximums. The exhibit was compiled from quotations, order files and

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3. The indictment charged that agreements had been made to limit discounts allowed from published prices.

from a daily log which had been maintained of each specific construction project on which it received orders from its distributors. All of the source documents for the exhibit were business records of Kohler, were in court, and they had previously been made available to the Government for inspection. Because of a mistaken belief that the title of the exhibit was misleading, the Court of Appeals held that the Trial Judge's rejection of this evidence (which was not based on the alleged defective title) was not an abuse of discretion.

On the question of whether Held's actions could have been to Kohler's benefit — and, in that sense, on its behalf — Kohler sought to bring out (1) the fact of its need to maintain a high volume of sales in order to maintain a high level of steady employment for its artisans, a need related to the difficulty of maintaining a trained labor force in the relatively rural location of its principal plant, and (2) to show that because of this need, any agreement by an employee to limit in any way his efforts to sell its fixtures would have been directly against the Company's interests.

The Government seized upon this aspect of Kohler's defense to cross examine its Sales Manager in a highly emotional and inflammatory way concerning the 1954 strike at Kohler. The Government conceded that the strike had nothing to do with the charges before the Court, but nevertheless was allowed to conduct an extensive cross-examination concerning Kohler's allegedly having used guns and ammunition and tear gas to break the strike; concerning its having allegedly condoned the use of industrial spies and "bugs" in the hotel rooms of Union leaders; and concerning its having allegedly evicted striking workers from their homes. These ques-

tions could only have inflamed the passions of the jury. Bitter labor disputes of the past have made the people of Western Pennsylvania sensitive to such accusations. The *voir dire* examination of the jurors prior to their selection showed that several of them or the members of their families had employment which made Union membership and orientation highly probable.

Although Kohler carefully restricted the testimony concerning its need for a high level of steady employment to the period after September 1962, the Government sought once again, in its cross examination of Kohler's President, to inject the irrelevant strike issue into the case. And, at the close of the case, when Kohler asked the Court for a ruling that no counsel should refer to the strike in his closing argument, the Court refused the request, notwithstanding the Government's express threat again to bring up the pre-1960 strike in its closing argument to the jury if Kohler, in its closing, should refer to the evidence concerning the company's need to maintain a steady level of employment in the period *after* September 1962. The prosecutor thus used the old Kohler strike not only to inflame the jurors' bias against Kohler but also to deter Kohler from making an effective argument to the jury on one important element of its defense.

The Court of Appeals was in agreement that the Government's cross examination about the strike was improper and should have been restricted by the Trial Court. Kohler's conviction was nevertheless affirmed because two members of the Court felt that Kohler had not demonstrated that it was prejudiced. On this point, one member of the Court disagreed and dissented.

Kohler was further hampered in its effort to get a fair hearing on the issue of its vicarious responsibility by the cursory instructions given to the jury. The Court's instructions concerning a corporation's responsibility for the acts of an employee consisted of a short, conclusory assertion that the jury could visit criminal liability upon the corporate defendants for acts of their employees which were done either within the scope of their employment *or* their apparent authority. In this part of its charge, comprising only 37 lines of the Court's 82-page charge, the Court repeated three times the instruction the jury could find a corporate defendant guilty if the act of its employee was *either* done in the course-of-employment *or* was within the scope of his actual *or* apparent authority. The charge did not adequately define or illustrate the concepts of course-of-employment, or actual or apparent authority, nor discuss the criteria on which a finding of their presence could be based.

Nowhere did the Court state that the Government had the burden of proving that the acts of the corporate employee had been done in the course of his employment and were within the scope of his authority or that the jury must be satisfied on these issues beyond a reasonable doubt.

The Court of Appeals rejected Kohler's criticism of the charge, stating the charge was not erroneous or inadequate and that Kohler's counsel had failed to comply with FRCP 30. It is submitted that a reading of the requests for charge which were submitted and refused, of the charge itself, and of the exceptions taken thereto, will disclose the justifiability of Kohler's complaints on this issue. (See Appendix D)

REASONS FOR ALLOWING THE WRIT.

This Court long ago established the guidelines which must be followed to minimize the serious threat of a miscarriage of justice which is inherent in any multi-defendant, conspiracy trial. See, e.g., *Krulewitch v. United States*, 336 U. S. 440 (1949); *Kotteakos v. United States*, 328 U. S. 750 (1946). It has also spoken eloquently in any number of cases on the obligations of federal prosecutors to refrain from improper methods calculated to produce a conviction. See, e.g., *Berger v. United States*, 295 U. S. 78, 88 (1935).

For the Court of Appeals to affirm Kohler's conviction in this case, notwithstanding the erroneous exclusion of evidence bearing on the issue of Kohler's vicarious responsibility, and despite the government's exploitation of the Kohler strike to arouse and inflame the jury and the trial court's summary and unenlightening charge on the issue of Kohler's responsibility for Held's acts is in conflict with the decisions of this Court and sanctions a departure by the trial court from the accepted and usual standards followed in federal criminal trials, especially those involving threatened convictions of serious consequence.

The majority of the court below has apparently misunderstood, and therefore, failed properly to apply the doctrine of "harmless error." Thus, despite their agreement that the Government's cross-examination about the Kohler Strike involved potential prejudice which outweighed its evidentiary value, Kohler was refused a new trial because two of the three judge panel professed that "we cannot find that this incident could have so affected the jury that a fair trial was

denied appellants." This reflects an erroneous standard of what is reversible error. As explained in *Kotteakos v. United States*, 328 U.S. at 765:

> ". . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. . ."

This petition also involves important issues concerning which this Court has never spoken — namely, (i) what are the criteria for determining when a corporate employee is so acting as to impose responsibility for an anti-trust violation upon his corporation and (ii) whether such liability may be imposed, consistently with due process of law, in the absence of actual authority or ratification, for acts allegedly done within the employee's "apparent" authority.

The trial court's charge on the issue of authority was fashioned broadly from the charge discussed by the Court of Appeals for the Sixth Circuit in *Continental Baking Co. v. United States*, 281 F.2d 137 (6th Cir. 1960). The Court there recognized, however, that the charge was not objectionable because, in contrast to the present case, in that case the government presented evidence that the principal had held out "his agent to third persons as having the authority which it now asserts the agent lacked. . ." (281 F.2d at 151). The Continental Baking "agency" charge, however, has now apparently entered the form books of the Department of Justice and of lower federal courts as an appropriate charge for use in any federal antitrust case involving a corporate defendant and, unless this Court intervenes, the

present case will become yet another precedent for holding corporations to the seriously unfair liability of conviction of a crime having massive collateral consequences[4] for the acts of an employee which are contrary to his instructions, which do not benefit the company and which occur on social occasions when the employee is not engaged in the transaction of any business for his employer, attendance at which violates well publicized company instructions.

This Court has held that one may not constitutionally be convicted of a serious crime without some element of personal fault. Where a corporation is held to criminal responsibility for the authorized or ratified acts of an agent, the agent's personal fault supplies this requirement. But to allow a conviction of crime to rest not on actual but apparent authority—as that was defined in this case—allows criminal punishment to be imposed without fault, without knowledge, without benefit, and despite the most punctilious efforts of the principal to comply rigidly with the law.

A study of the cases reveals that there is no decision of this Court (and relatively few decisions by the Courts of Appeals) dealing discursively with the legal and factual criteria to be applied in a criminal trial involving the imposition of vicarious liability on a corporation for the acts of its employees which may violate the antitrust laws. In actual practice, the cases

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4. This case should not be considered to involve only the $50,000 fine imposed, for the judgment of conviction is admissible against Kohler in the almost 400 private treble damage actions pending throughout the United States, approximately 100 of which are class actions in which there are more than 4,000 plaintiffs or interveners.

dealing with this defense have frequently sustained convictions on evidence and upon instructions which would not have been countenanced in a civil action for damages involving the issue of authority and course of employment. The corporate defendant in a criminal charge involving such liability is, in effect, the victim of a disparate and discriminatory application of the law of vicarious responsibility. These considerations make it appropriate for this Court to grant certiorari in order to declare and settle the law to be applied by lower federal courts in this area.

GILBERT J. HERLWIG
PAUL J. WINSCHEL
REED, SMITH, SHAW & MCCLAY
Counsel for Defendant,
Kohler Co.

OF COUNSEL,
LUCIUS P. CHASE
Kohler, Wisconsin 53044

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 18,182—18,187

UNITED STATES OF AMERICA

v.

AMERICAN RADIATOR & STANDARD SANITARY CORPORATION; KOHLER CO.; CRANE CO.; WALLACE-MURRAY CORPORATION; UNIVERSAL-RUNDLE CORPORATION; RHEEM MANUFACTURING COMPANY; BORG-WARNER CORPORATION; BRIGGS MANUFACTURING COMPANY; PLUMBING FIXTURE MANUFACTURERS ASSOCIATION; JOSEPH J. DECKER; DANIEL J. QUINN; NORMAN R. HELD; ROBERT E. CASNER; JOHN B. BALMER; STANLEY S. BACKNER; ROBERT J. PIERSON, JR.; and GEORGE W. KELCH.

AMERICAN STANDARD, INC.,
Appellant in No. 18,182

KOHLER COMPANY,
Appellant in No. 18,183

BORG-WARNER CORPORATION,
Appellant in No. 18,184

JOSEPH J. DECKER,
Appellant in No. 18,185

DANIEL J. QUINN,
Appellant in No. 18,186

NORMAN R. HELD,
Appellant in No. 18,187

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued May 21, 1970 and May 22, 1970

Before SEITZ, ALDISERT, *Circuit Judges* and HIGGINBOTHAM, *District Judge*

Opinion of the Court

(Filed September 23, 1970)

SEITZ, *Circuit Judge:*

These are appeals from judgments of conviction entered after jury verdicts finding violations of section 1 of the Sherman Act, 15 U.S.C. §1, by appellants American Radiator & Standard Sanitary, Inc. (American Standard); Joseph J. Decker and Daniel J. Quinn, President and Vice President respectively of American Standard's Plumbing and Heating Division; Kohler Co. (Kohler); Norman R. Held, member of Kohler's board of directors and Sales Manager for Plumbing Fixtures; and Borg-Warner Corp. (Borg-Warner).

Appellants were indicted on October 6, 1966. Also indicted with appellants were five other plumbing fixture manufacturers, Crane Company (Crane), Universal-Rundle Corp. (Universal-Rundle), Rheem Manufacturing Co. (Rheem), Wallace-Murray Corp. (Wallace-Murray), and Briggs Manufacturing Company (Briggs); five other employees of corporate defendants, Robert E. Casner, Vice President & General Manager of Crane's Plumbing, Heating, Air Conditioning Group; John B. Balmer, President of Wallace-Murray; Stanley S. Backner, Universal-Rundle's Vice President for Marketing

until December 1963, and Executive Vice President of the Plumbing Fixtures Manufacturers Association thereafter; Robert J. Pierson, Jr., Vice-President for Marketing of Rheem's Home Products Division; George W. Keich, President and General Manager of Borg-Warner's Intersoll-Humphryes Division; and the Plumbing Fixtures Manufacturers Association (PFMA). The one-court indictment charged that from September 1962 until sometime in 1966 the corporate and individual defendants, together with various unindicted co-conspirators, engaged in an unlawful combination and conspiracy consisting of "a continuing agreement, understanding and concert of action . . . to raise, fix, stabilize and maintain the prices of enameled cast iron and vitreous china plumbing fixtures" in violation of section 1 of the Sherman Act. The indictment further stated that:

> "13. In formulating and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators did those things which they combined and conspired to do, including, among other things, the following:
>
> "(a) Held Meetings at various times under the guise of so-called 'official' PFMA meetings and during conventions of plumbing fixtures distributors and wholesalers at hotels and clubs, including, among others Greater Pittsburgh Airport Hotel, Pittsburgh, Pennsylvania; Sheraton-Chicago Hotel, Chicago, Illinois; Shoreham Hotel, Washington, D. C.; The Americana of New York, New York, New York; The Waldorf-Astoria, New York, New York; Palm Beach Biltmore Hotel, Palm Beach, Florida; and Chicago Athletic Club, Chicago, Illi-

nois, at which times said defendants and co-conspirators:

"(i) agreed to increase prices of enameled cast iron and vitreous china plumbing fixtures;

"(ii) agreed to limitations on maximum discounts from published prices of enameled cast iron and vitreous china plumbing fixtures;

"(iii) confronted one another with reported deviations from agreed upon maximum discounts and published prices of enameled cast iron and vitreous china plumbing fixtures;

"(iv) agreed to discontinue the manufacture of regular enameled cast iron plumbing fixtures which were lower-priced than acid-resistant enameled cast iron plumbing fixtures; and

"(v) agreed to seek and to obtain, as part of the agreement to discontinue the manufacture of enameled cast iron plumbing fixtures, the revision of the Enameled Cast Iron Commercial Standard to provide for only acid-resistant enameled cast iron plumbing fixtures;

"(b) Published price announcements and price books increasing the prices of enameled cast iron and vitreous china plumbing fixtures in accordance with agreements reached;

"(c) Discontinued the manufacture of regular enameled cast iron plumbing fixtures in accordance with the agreements reached;

"(d) Telephoned and otherwise contacted one another between meetings concerning:

"(i) increased prices on vitreous china plumbing fixtures;

"(ii) reported deviations from agreed upon maximum discounts and published prices of enameled cast iron and vitreous china plumbing fixtures; and

"(iii) the discontinuation of the manufacture of regular enameled cast iron plumbing fixtures;

"(e) Used the office of Secretary of PFMA, among other things, to schedule and arrange for the aforesaid meetings, to maintain a line of communication between said defendants and co-conspirators and to co-ordinate the efforts of said defendants and co-conspirators in seeking and obtaining the revision of the aforesaid Enameled Cast Iron Commercial Standard."

The defendants named in the indictment that are not involved in this appeal entered pleas of *nolo contendere* in the fall of 1968 and were thereafter sentenced. Appellants entered pleas of not guilty, and their sixteen-week jury trial began on January 13, 1969. Their basic theory was that the price moves alleged to be the result of illegal agreements were in fact the result of the operation of ordinary economic forces in the market place. The government called ten witnesses and rested its case on February 19, 1969. Appellants Quinn, Decker, American-Standard, Heid and Kohler presented a total of 21 witnesses and rested their cases on April 23, 1969. Appellant Borg-Warner elected not to introduce any testimony of its own although its counsel did cross-

examine witnesses and place some exhibits in evidence. The trial transcript consisted of 10,256 pages and more than 900 exhibits were introduced into evidence. The jury retired to deliberate on the afternoon of May 2, 1969, and at 10 p.m. returned guilty verdicts against all six appellants, and they were thereafter sentenced.

Appellants have filed a Joint Brief in this court advancing numerous grounds in support of their claim that all their convictions should be reversed. They argue that they were denied a fair trial because of the trial judge's excessive and partisan participation in the trial and by his erroneous evidentiary rulings; that they were substantially prejudiced and denied a fair trial by the improper and inflammatory conduct of the prosecuting attorneys; and that they were prejudiced by the trial judge's procedures in connection with the jury charge, errors in the charge, and the pressured submission of the case to the jury. In addition separate briefs have been filed by all appellants but American Standard. Each advances various individual grounds for reversal. Unlike appellants American Standard and Quinn, appellants Kohler, Held, Borg-Warner and Decker argue that because of the weakness of the government's case against them, their motions for judgment of acquittal should have been granted.

We will first deal with the arguments raised in appellants' Joint Brief and then examine those raised in the individual briefs. In order to evaluate the claim of appellants Kohler, Held, Borg-Warner and Decker that the evidence against them was insufficient to go to the jury (and to provide some indication of the strength of the government's case against all of the appellants), we will

begin our analysis with a review of some of the government's evidence.

The Government's Case

We emphasize at the outset our conclusion that the evidence of an illegal price-fixing conspiracy is compelling. The proof of the conspiracy rests in large part upon the testimony of witnesses who were themselves defendants or executives of defendant corporations. These witnesses described various meetings they attended where price discussions occurred and price fixing-agreements were reached. When this multiple "eyewitness" testimony is considered in light of the largely admitted simultaneous price moves made by the indicted manufacturers, the strength of the government's case becomes apparent.

We will discuss in turn the four "phases" of the conspiracy alleged by the government. We note that the government was not required to prove that all the means and methods alleged in the indictment were utilized or that each defendant participated in each phase of the conspiracy or, indeed, that any of the illegal agreements were carried out. *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940). A conviction against any defendant is warranted if the jury finds beyond a reasonable doubt that the conspiracy alleged in the indictment existed and that the defendant knowingly became a member of the conspiracy, either at its inception or at a later phase of its operation. Moreover, no formal agreement is necessary to constitute an unlawful conspiracy; it is sufficient that a concert of action be contemplated and the defendants conform to the arrangement. "Where the circumstances are such as to warrant a jury in find-

ing that the conspirators had a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified." *American Tobacco Co. v. United States*, 328 U. S. 781, 810 (1946). See also *Esco Corp. v. United States*, 340 F.2d 1000 (9th Cir. 1965).

October-November 1962 Enameled Cast Iron Bathtub Price Increase

It is undisputed that, with the exception of Borg-Warner, all the indicted corporations published identical increased prices on special truckload and carload "discount prices" on certain high volume enameled cast iron bathtubs in October and November 1962. Although Borg-Warner did not issue a printed sheet, there was evidence that it "published" similar price increases on the bathtubs in question by a series of telephone calls made in October to sales representatives around the country, each of whom communicated the prices to wholesale distributors. We think the evidence would support a jury finding that these bathtub price increases were the direct result of an agreement reached at a meeting of the indicted corporations' sales officials held in appellant Quinn's room at the Sheraton-Chicago Hotel on September 17, 1962, the evening before a regularly scheduled PFMA meeting.

There was evidence that the following persons were present at this September 17 gathering in Quinn's room: appellant Quinn (American Standard), appellant Held (Kohler), defendant Kelch (Borg-Warner), defendant Casner (Crane), defendant Beckner (Universal Rundle), Charles J. Callanan, Jr., a Rheem executive and its

representative to the PFMA, and J. V. Cannon, Director of Marketing of the Eljer Division of Wallace-Murray. There was substantial "eyewitness" testimony concerning price discussions and agreements at this gathering. For example, the government's first witness, Callanan (Rheem), testified that he attended this September 17 gathering in Quinn's room and that specific prices for bathtubs in question were discussed there. He further testified that when he left the meeting he knew what the price increases would be:

> "Q. The question, Mr. Callanan, was: What was decided with respect to the specific increased prices on bathtubs in that room?
>
> "The Court: If anything.
>
> "The Witness: The prices as reflected in my bulletin of November 2, 1962 [Rheem's published discount prices], were the prices that I came out of that room with that understanding."

These prices were the identical prices adopted by all the other indicted manufacturers. Moreover, although Callanan could not recall specific statements by each attendee concerning the bathtub price increase, he did testify that defendant Kelch (Borg-Warner) participated in price discussions and that appellant Heid (Kohler) "was there listening" to them.

Cannon (Wallace-Murray) also testified that he was present at the meeting in Quinn's room and that prices for the bathtubs in question were discussed there. He further stated that when he returned to Pittsburgh he reported the price discussions to his superior, Loren H. Bonnett, Vice President and General Manager of Wallace-Murray's Eljer Division and told him he "felt confi-

dent there would be a price increase" on the bathtubs in question. Bonnett confirmed that Cannon reported the September 17 price discussions to him:

> "Q. To the best of your recollection, Mr. Bonnett, what did Mr. Cannon tell you concerning these increased prices?
>
> "A. To the effect that there was a general discussion, that higher prices were wanted and needed, by everyone, and that there was a tentative agreement to increase prices, tentative discussion. I couldn't say that there was a definite agreement by everyone, but prices were discussed."

In light of this evidence, and considerable other evidence in the record, we think the jury could have found that the October-November 1962 enameled cast iron bathtub price increases were the result of a price fixing conspiracy. As to all appellants[1] except Decker (American Standard),[2] there was certainly sufficient evidence to go to the jury.

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1. Kohler contends that there was insufficient evidence of Held's authority to impose criminal liability on Kohler. We will discuss our conclusion to the contrary along with our consideration of the other arguments raised in the separate brief of appellants Kohler and Held.

2. Decker argues that there was no evidence to justify a finding that he participated in any of the four phases of the conspiracy. The government, on the other hand, argues that there was sufficient evidence for the jury to conclude that Decker participated in all four phases. Since we are convinced of the sufficiency of the evidence (which will be discussed later) concerning Decker's participation in the fourth phase of the conspiracy, the price fixing concerning the changeover to all acid-resistant fixtures, and since that evidence alone is

The Agreement to Maintain and to Increase the Prices of Vitreous China Plumbing Fixtures

The second goal of the conspiracy, the government asserted, was to maintain and ultimately to increase prices on vitreous china plumbing fixtures. It is undisputed that on January 14, 1963 Crane announced an approximately 7 per cent increase in published wholesaler net prices for all vitreous china plumbing fixtures and at the same time withdrew certain special discount prices on some high volume items. On January 23, 1963 American Standard increased both its wholesaler net prices and its special discount prices on vitreous china plumbing fixtures by about 7 per cent. Within a month thereafter all[3] the other indicted manufacturers had substantially followed American Standard's new prices, and Crane retroactively reinstituted special discount prices at the same higher level adopted by the other manufacturers. We think there was ample evidence for the jury to find that these price increases were the result of an illegal agreement.

Callanan (Rheem) testified, for example, that at the September 17, 1962 gathering in Quinn's room at the Sheraton-Chicago hotel:[4]

". . . there was a discussion with regard to raising

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sufficient to support the jury verdict against Decker, we need not pass on the sufficiency of the evidence of his involvement in the first three phases.

3. Borg-Warner increased its trade sheet prices on vitreous china plumbing fixtures by 7 per cent on February 12, 1963.

4. As we have stated there was evidence that Quinn (American Standard), Held (Kohler), and Kelch (Borg-Warner) were among those present.

> the prices of china on the Special Buying Opportunity [special discount price sheets] but it was felt that unless the short-line manufacturers increased their price, we couldn't get too far away from it."

He also related that he concluded at the time that the special discount prices in effect then would be maintained by the group:

> "Q. What was decided with respect to the vitreous china staple prices on your Special Buying Opportunity of May 1962, which was the subject of discussion?
>
> "The Court: If anything.
>
> • • •
>
> "A. My opinion when I left the room was that there would be no change in staple prices in that Special Buying Opportunity [special discount price sheet]."

Callanan also testified that at the September 17 meeting "there was a feeling that there should be an across-the-board raise of some percentage to strengthen the china prices."

The evidence also indicates that top level representatives of the Enameled Cast Iron Industry Group of the PFMA met at the Shoreham Hotel in Washington, D.C. on November 20, 1962, the day after a special dinner meeting of the Enameled Cast Iron Industry Group in Washington. Robert J. Pierson, Vice President for Marketing of Rheem's Home Products Division, testified that at this November 20 meeting he participated in a discussion regarding some proposed price increases with Quinn (American Standard), Held (Kohler), Kelch (Borg-Warner) and Casner (Crane). He said that Casner told the group his company had instructed him to

raise prices and that they were going to certain levels in spite of what the industry might do. Pierson further testified that, at this point:

> "There was a general discussion regarding each individual company's reaction to it. It was my opinion when I left that people probably would follow the lead of Crane in some form or another."

We have already pointed out that on January 14, 1963, Crane was the first defendant to announce an across-the-board 7 per cent increase for all china fixtures in its wholesaler net price book and that shortly thereafter all the other indicted corporations followed.

Charles Betz, who at the relevant time was Briggs' Sales Vice President, testified that in January 1963 he had a telephone conversation with Raymond A. Pape, a Crane official, concerning vitreous china prices and told him he "would certainly go along" with a sensible price increase "because these past price practices were very disastrous to our business." Moreover, Betz testified that, when Briggs subsequently increased its china prices, it was because of its competitors' actions and pursuant to his telephone conversation with Pape.

Government witnesses also established that, after the vitreous china increase had been effected by all defendants but Borg-Warner, there remained considerable doubt whether the new prices would remain in force. However, the evidence indicates that at a "special meeting" of the Enameled Cast Iron Industry Group of the PFMA at the Waldorf-Astoria in New York on February 7, 1963 several of the conspirators agreed to try to maintain the new prices. Decker and Quinn (American Standard), Held (Kohler), Kelch (Borg-Warner), Calla-

nan (Rheem), Pape (Crane), Bonnett (Wallace-Murray), and Backner (Universal-Rundle) attended this special meeting. Bonnett testified that after the "formal" part of the meeting there was a "price discussion." He stated that he stayed for only a few minutes and then went to Quinn's room upstairs, and that Quinn told him he would come up later and report whatever transpired. Quinn arrived at 4:00 p.m. and they discussed the price decisions made at the meeting. With respect to the vitreous china price increase Bonnett testifed as follows:

> "Q. Did you discuss with Mr. Quinn—did you tell him what Murray Corporations' intentions were with respect to the recent vitreous china increase?
>
> • • •
>
> "A. We had published a new price and when we did, it was our intention to try to adhere to those prices to the best of our ability. So this would have been understood, that we would try to maintain any new prices that we had published.
>
> • • •
>
> "Q. Did Mr. Quinn indicate to you at this time, in his hotel room, what the view of the people downstairs was in connection with the recent vitreous china increase?
>
> • • •
>
> "A. Well, the general consensus was that the new prices would—we would try to maintain the new prices."

Five days after Kelch (Borg-Warner) attended this February 7 meeting Borg-Warner also announced a 7 per cent across-the-board increase on china fixtures.

Thus in the light of the above and other substantial evidence in the record, we think a jury finding that vitreous china prices were fixed as a result of illegal agreements would be plainly justified. The evidence on this point against all appellants, except perhaps Decker, was sufficient to go to the jury.

The Agreement to Limit Maximum Discounts From Wholesaler Net Prices

The third phase of the conspiracy, the government asserted, was an agreement to limit discounts on quotations on project or job work to a maximum of 15 per cent from wholesaler net prices on enameled cast iron fixtures and 20 per cent on china fixtures. We think there was sufficient evidence to justify a jury finding that the defendants illegally agreed to limit maximum discounts in violation of the Sherman Act.

Callanan testified that there was a discussion about job pricing and maximum discounts at the gathering in Quinn's room at the Sheraton-Chicago Hotel on September 1, 1962:[5]

"Q. What was the discussion that evening in Mr. Quinn's room concerning discounts from sheet prices, Mr. Callanan?

"A. I can't remember what the discussion was, but I came away with the opinion that discounts that I would be using would be 15 per cent on iron and 20 per cent on china.

"Q. What was your—

"The Court: That you alone would be doing that?

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5. See note 4, supra.

"A. I don't know what other people were doing.

• • •

"The Court: All right. Then, you would do it. You came away with the opinion that only you would be doing what you said you would be doing?

"A. Oh, no.

"The Court: That is what we want to know. If it is that, say that.

"A. I was of the opinion that other people would be using the same structure.

"Q. What other people, sir?

"A. The other members who were in the room that evening.

"Q. And what figures were they?

"A. Fifteen per cent on iron and twenty per cent on china."

Moreover, Bonnett (Wallace-Murray), who had been upstairs in Quinn's room during the price discussions at the February 7, 1963 meeting at the Waldorf-Astoria[6] testified that Quinn in his report to him about the price discussion:

". . . indicated there had been some discussions about discounts on plumbing fixtures and to try to keep some semblance of reason, and that there was a tentative discussion or agreement not to go below a certain point."

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6. Decker and Quinn (American Standard), Held (Kohler), Kelch (Borg-Warner), Callanan (Rheem), Pape (Crane), Bonnett (Wallace-Murray), and Backner (Universal Rundle)attended the Waldorf-Astoria meeting.

Bonnett also stated that the specific discount limits discussed were 15 per cent on cast iron and 20 per cent on vitreous china. He further testified that he told Quinn "we would try to adhere to those discounts."

We think there was sufficient evidence in the record for the jury to find an illegal agreement to limit maximum discounts and that there was sufficient evidence against all appellants, except perhaps Decker, on this point.

The Agreement to Eliminate Regular Enameled Cast Iron Plumbing Fixtures and to Increase the Prices of Acid Resistant Fixtures

The fourth phase of the conspiracy alleged by the government was an agreement to discontinue the production of the lower priced line of regular enameled cast iron plumbing fixtures with the planned result of an increased price structure resulting from the changeover to all acid resistant enameled cast iron fixtures. Regular enameled fixtures, because of their lower price, constituted the defendants' largest selling line of enameled cast iron plumbing fixtures; regular enameled fixtures accounted for more than $20,000,000 in gross annual sales at American Standard alone. Nevertheless, beginning in early 1961 the industry began considering the possibility of making only the higher priced acid resistant fixtures "in response to the increasing competition from plastic fixtures and steel fixtures both of which were all acid-resisting." (Appellants' Joint Br. p. 24). On June 7, 1963 the Department of Commerce at the urging of the industry announced a revision of former Commercial Standard CS 77-56, effective July 10, 1963,

and for the first time made acid resistant cast iron enamel fixtures the industry standard.

On July 1, 1963 American Standard announced its intention to discontinue production of regular enamel cast iron plumbing fixtures and it published revised prices on its acid resistant fixtures which were higher than those for the old regular enamel fixtures. Within two months, all the indicted producers of cast iron plumbing fixtures announced the discontinuation of regular enameled fixtures and published similar new prices for acid resistant fixtures. We think there was ample evidence to justify a jury finding that the changeover to all acid resistant fixtures with its concomitant new price schedule was the result of an agreement in violation of section 1 of the Sherman Act.

For example, there was evidence that acid resistant prices were agreed upon at a gathering after a meeting of the PFMA Enameled Cast Iron Industry Group at the Biltmore Hotel, Palm Beach, Florida, on March 28, 1963. Pierson (Rheem) testified that after the official meeting he met with Quinn and Decker (American Standard), Kelch (Borg-Warner), Held (Kohler), Casner (Crane), Callanan (Rheem), Balmer and Cannon (Wallace-Murray), Backner (Universal Rundle) and possibly Pape (Crane) in Quinn's hotel room where they discussed the changeover and the new acid resistant prices. Pierson testified in part as follows:

> "A. The discussion resolved [sic] around the specific time-table that would occur in this change from —in the elimination of regular enamel and the pricing schedule that would resolve as a result of this change.

"Q. Were specific prices mentioned during the course of this meeting?

"A. Yes.

"Q. Were specific prices mentioned for the 14-inch and the 16-inch bathtubs?

"A. Yes.

"Q. Were there any prices or any formulae presented at this meeting concerning small ware? That is lavatories?

"A. There was a plan, yes, a price schedule put forth.

• • •

"Q. What was the formula put forth, sir?

"A. It was approximately as we have indicated the increase in our price schedule.

• • •

"Q. What was decided at this meeting, if anything, Mr. Pierson?

"A. Well, as I said originally, there was a timetable established *and a new pricing structure, which I felt was agreed by all those present.* (emphasis added)

Pierson specifically recalled that appellant Held (Kohler) said that he was speaking for his company and that they would go along with the plan. He also stated that the entire group remained at the meeting until the price discussions were concluded. Callanan confirmed that there was a price discussion at this gathering and that a specific pricing structure was put forth. Cannon also testified that the "proper philosophy" of pricing in the new all acid resistant market was discussed at this gathering and that certain prices were decided upon.

There was also evidence that new acid resistant prices were again discussed and the illegal agreement reaffirmed at a meeting at the Airport Hotel in Pittsburgh on May 15, 1963 attended by Decker and Quinn (American Standard), Held (Kohler), Kelch (Borg-Warner), Casner and Pape (Crane), Bonnett and Cannon (Wallace-Murray), Backner (Universal Rundle), and Callanan (Rheem). Bonnett was asked at trial what was decided at the Airport Hotel meeting with respect to certain colored bathtub prices and responded:

> "It's difficult to say whether a definite decision was reached on these prices, they were discussed by most of the people there but we certainly did not poll the group to say, 'Would you do this, will you do that?' It was my understanding when I left the meeting that the prices would generally be on this level."

Pierson did not attend this meeting but testified that when his subordinate Callanan returned from the meeting he reported to him that it "was his opinion that the plan to phase out regular enamel and the price schedule proposed was going to go through."

Moreover, there was evidence that the illegal agreement was again discussed and reaffirmed at a meeting in Quinn's room at the Waldorf-Astoria Hotel in New York, on June 26, 1963 attended by appellants Decker, Quinn and Held, as well as Kelch, Casner, Pape, Balmer, Bonnett, Cannon, Pierson, Callanan and Backner. Pierson testified that at this meeting there was "a general review of the proposed plan on this [all acid resistant] product line and the pricing that was related thereto." Cannon testified that Quinn or Decker showed him a copy of the announcement American Standard was going

to make concerning the changeover to all acid resistant fixtures and the new acid resistant prices; he further stated that this document was discussed by the group.

We think the overwhelming evidence on this phase of the conspiracy clearly warranted a jury finding that the changeover to all acid resistant fixtures and its concomitant price rise was the result of an illegal price-fixing conspiracy. Certainly there was sufficient evidence to support a jury finding against all appellants on this issue, including the appellant Decker. We think the evidence concerning events which transpired at three conspiratorial meetings he attended was certainly sufficient to support the jury verdict against him.[7]

JOINT ARGUMENTS

Partisan Participation by the Trial Judge

Appellants contend that they were denied a fair trial because of the district judge's excessive participation in the trial, although they disclaim any intent to charge personal hostility on his part. They "explain" his

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7. As the Supreme Court pointed out in *United States v. Wise*, 370 U.S. 405, 416 (1962), "a corporate officer is subject to prosecution under §1 of the Sherman Act whenever he knowingly participates in effecting the illegal contract, combination, or conspiracy—be he one who authorizes, orders, or helps perpetrate the crime. . . ."

In addition to the above evidence against Decker, we note the following facts: Decker was President of American Standard's Plumbing and Heating Division; Quinn was Vice President and testified that he had a close working relationship with Decker; and the evidence of the participation of American Standard and Quinn in all phases of the conspiracy was strong. In light of all this, we find no merit in Decker's claim that the case against him was too weak to go to the jury.

conduct by stating their belief that from the outset the judge was convinced of the appellants' guilt and thus viewed their conduct and that of their attorneys as designed either to be obstructive or to invite error.

The appellants have culled from the over 10,000 page trial transcript some three hundred incidents which they say illustrate the objectionable nature of the judge's conduct. They have broken these examples down into the following categories:

1. The trial judge's deprecation of appellants' evidence;
2. The trial judge's cross-examination of witnesses and other prosecutor-like intrusions;
3. The trial judge's abusive and belittling treatment of defense witnesses and counsel;
4. The trial judge's openly suspicious attitude toward defense counsel and witnesses;
5. The trial judge's contrasting treatment of the government.

We are completely satisfied that no one of the incidents relied upon by appellants deprived them of a fair trial. But appellants contend that the incidents were so pervasive and frequent that they cumulatively had that result. In order to evaluate this most serious charge an examination was made of each page of the trial transcript.

A reading of the many unrelated incidents selected from a jury trial lasting sixteen weeks gives a distorted impression of the judge's conduct. Many of the incidents relied on by appellants are nothing more than the typical rulings and comments found in any trial transcript.

Others arise from the judge's understandable desire to keep the trial moving. Certainly the trial judge was testy on occasion and certainly the reasons given for some of his rulings left something to be desired. But all of this must be kept in perspective. This was a long trial and in great measure involved an exceedingly technical subject. Much of appellants' grievance is really directed at the correctness of the judge's evidentiary rulings which are matters for independent consideration. But in fairness to the judge it must be said that many of the objections of appellants' counsel were so lacking in substance or so repetitive that they deserved to be consistently overruled. Because of the number of these rulings, however, they could have created the false impression with appellants that judicial objectivity was lacking.

Our evaluation of the record leads us to conclude that the trial judge did not unduly deprecate appellants' evidence, that in their setting his questions to witnesses did not exceed proper bounds either in tenor or extent, that there was nothing approaching abuse either to defense witnesses or their counsel, that the trial judge did not portray an openly suspicious attitude toward defense counsel and witnesses, and finally, that there was none of the so-called contrasting treatment of the government which appellants claim demonstrates the trial judge's unfairness to them.

Prosecutor Misconduct

Appellants advance numerous reasons why they were substantially prejudiced and denied a fair trial as a result of the improper and inflammatory conduct of the government attorneys. We shall consider them seriatum.

Appellants first assert that the prosecutor indulged in misleading and inflammatory cross-examination of appellant Norman Held (Kohler) concerning alleged unfair labor practices by Kohler prior to the indictment period. In his opening to the jury Kohler's counsel said:

> "Now, the plant up in Kohler, Kohler Village, employs about four or five thousand people. It is the principal employer in the whole county. One way or the other the economy of the county depends upon full employment at Kohler. Kohler accepts that responsibility and has a philosophy to try to discharge it. It is a remarkable thing. There is a period in the 1930's and thereafter, you people, some of you people remember the 1930's and thereafter, a period of 17 years when not an employee of the Kohler Company lost a day's pay through layoff. In this decade the same thing has been true."

Over government objection Held was permitted to testify as follows:

> "Q. And how large a town is Kohler and would you just describe it, please, the village of Kohler?
> "A. That is just a small town of several thousand and it is just a little bit different from the usual factory type of town. It is a planned community and it is probably due to the fact that the Kohler family and the Kohler Company didn't want what might be termed a factory town and brought in town planners, architects and engineers with the result that it is rather a pretty little place with its own school system and its own governing body, the people that live there and with a high incidence of owner-owned homes.

"Q. People mostly own their own homes there, is that correct?

"A. Yes, sir.

"Q. Mr. Held, could you give us a brief history of the Kohler Company, when it started to make plumbing fixtures, when it was started, and so forth?

"A. Yes, I think I can do that. The company had its start in 1873 when one Michael Kohler, an immigrant from Austria, started a manufacturing plant mostly castings in Sheboygan, Wisconsin. And at that time he produced farm tools, farm equipment, some things like iron drinking fountains and iron horse troughs and items similar to that, some ornamental things, too, that could be cast at the time. He did some castings in bronze or brass and steel tubes. However, about ten years later, 1883 or so, he began to get into enameled utensils and graduating into the enameled plumbing fixture business and then a new plant was needed, so around about 1900 or so, a new plant was constructed about three miles west of Sheboygan, Wisconsin, and this is the present site of the plant now and by that time, the primary product was plumbing fixtures, and at this time enameled cast iron plumbing fixtures. And about 1905, the son of John Michael Kohler, who passed away, Mr. Walter J. Kohler took over as president and from that time forth, the business grew and became emphatically a manufacturer of plumbing fixtures and began to grow and market its product more widely."

On cross-examination the prosecutor asked Held the following question:

> "Q. Mr. Held, didn't you purposely leave out of your history of the Kohler Company the fact that between 1954 and 1960, Kohler had one of the longest and bitterest strikes in American history at the end of which Kohler Company was found by the National Labor Relations Board to have engaged in an illegal refusal to bargain in good faith and in other unfair labor practices?"

An objection was made by the attorney for American Standard. Nothing was said by Held's attorney. However, the attorney for Kohler addressed the court as follows: "If the Court please, I urge the Court not to sustain the objection. I would wish the witness to be allowed to answer." Whereupon the witness purported to explain in a rather oblique fashion his lack of reference to the strike. The prosecutor then asked additional questions which went into some detail concerning unfair labor practices found by the National Labor Relations Board,[8] eventually referring to Kohler's purchase of guns, ammunition and tear gas, eviction of strikers, investigating the private lives of union officials, and other inflammatory topics.

The emotional nature of some of the cross-examination on this subject matter may have tended to temporarily divert the jury from passing on the merits of the criminal charges, at least as to Kohler and Held.

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8. Appellants contend that the questions did not fairly state the findings of the National Labor Relations Board. We think the deviations are not of independent significance here.

However, Kohler and Held invited some such inquiry by first attempting to create a picture of a completely beneficent employer. Moreover, the initial statement by Kohler's counsel, when a threshold objection was made to such cross-examination, "opened the door further." However, when Kohler's counsel later objected on the ground that the questioning had become inflammatory —by reference to Kohler's purchase of guns and tear gas, etc.—we think the judge should have terminated the line of questioning. We think its potential for prejudice outweighed its evidentiary value. We say this despite our realization that the witness never did permit a possibly less inflammatory development of the government's position because of a claimed lack of personal knowledge of events during the strike period although some of his favorable direct testimony concerning Kohler suffered from the same infirmity.

In the circumstances of this case, however, we are unable to find that the nature of the interrogation constituted reversible error even as to Kohler and Held. It was an incident involving two appellants. The time spent on it before the jury was minimal, perhaps one hour in a total of sixteen weeks. The trial proceeded for several weeks after the incident. At Kohler's request, the matter was not alluded to either in the summations or the charge. Considering these factors in their setting and in conjunction with the strength of the government's evidence on the criminal charge, we cannot find that this incident could have so affected the jury that a fair trial was denied appellants.

The appellants also accuse the prosecutor of using his opening statement to lead the jurors to believe they

were victims of the alleged conspiracy.[9] The trial judge denied appellants' motion for a mistrial. We fully recognize that a prosecutor is required to maintain a high standard of conduct in the performance of his duties. In a proper case his conduct may require a mistrial. See *United States v. Schartner,* 426 F.2d 470 (3d Cir. 1970). But we think the prosecutor here was saying nothing, which was not rather self-evident in view of the nature of the charge and the products involved.

Appellants further contend that the prosecutor appealed to jury bias by stating in his opening and closing remarks that the grand jury which returned the indictment was composed of local residents. Passing over the appellants' failure to object on this score, we think it lacks sufficient substance to warrant reversal either alone or in conjunction with other claimed errors. Indeed, defense counsel were not above indicating to the jury that appellants were represented by Pittsburgh counsel as opposed to the government's Washington representation.

Appellants next assert that the government intentionally adduced incriminating and/or impeaching evidence through improper and prejudicial examination of witnesses. Their first grievance under this heading relates to the government's use for refreshment pur-

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9. "Now, when the plumbing contractor gets it, he doesn't keep it. He sells it. To whom does he sell it? He sells it to you. He puts another price on top of it. So, if you have the manufacturers, as is the case here, agreeing to increase prices that they sell plumbing fixtures to their wholesalers, sooner or later you are going to be paying that increase, the public. Particularly, on those plumbing fixtures which were the heart and soul of this conspiracy."

poses during cross-examination of appellants Quinn and Decker of certain tape recordings of alleged telephone conversations with defendants and third parties made by William Kraemer.[10] It must be emphasized that the jury never was given an identification of the voices on the tape or told what was said. The issue reduces itself to whether the district court committed error by permitting the use of tapes and earphones in an attempt to refresh the witnesses' recollection rather than requiring the use of the transcript of the tapes. We think an exercise of discretion was involved and we cannot find an abuse of discretion under the circumstances of this case. *United States v. McKeever*, 271 F.2d 669 (2d Cir. 1959); see 3 WIGMORE, *Evidence* §765 (3d ed. 1940).

Appellants also charge the prosecuting attorneys with violation of their professional obligations of candor and fairness. We have examined the bases for this charge and find them to be without merit. It is obvious that in a case of this magnitude the prosecutor would slip on occasions or suffer from a faulty recollection of the evidence. Indeed, conflicting evaluation by counsel of the probative significance of evidentiary matter is often a significant aspect of a trial, even more so when it is a jury trial. We think the appellants' charges against the prosecution are lacking in substance.

Appellants' last objection is to some statements made in the prosecutor's closing although they did not move for a mistrial. Certainly the prosecutor did overstep the bounds of propriety in a few instances in the course of his five hour closing, particularly in appearing

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10. Kraemer was Executive Secretary of the PFMA.

to personally vouch for the integrity of a government witness and in implying the existence of damaging evidence outside the record. But in our view the trial court, by the explicit instructions it gave the jury at both the government's and appellants' request, fairly corrected the matter. We do not view the prosecutorial aberrations as being so prejudicial to defendants that they were deprived of a fair trial. See *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, 237 (1940).

Evidentiary Rulings

Appellants argue they were prejudiced by certain rulings on government evidence. They first challenge the propriety of the admission of Government Exhibits 551 through 556 (HCA notes). As we have noted, the elimination of regular enamel products and the fixing of acid resistant enamel prices was the fourth alleged event in the criminal conspiracy charged by the government. A part of the government's evidence on this aspect of the conspiracy concerned events at an informal session after the PFMA meeting at the Palm Beach Biltmore on March 28, 1963. As evidence of the agreement to eliminate regular enamel and to fix acid resistant fixture prices, the government offered two documents. One was an American Standard worksheet entitled "Acid-Resisting Enamel Prices" dated March 1, 1963. The other consisted of six pages of undated and unsigned handwritten notes on the stationery of the Hotel Corporation of America (HCA notes), which echoed figures and statements on the American Standard price worksheet. The appellants claim the admission of the HCA notes was reversible error.

They first argue that the notes were inadequately identified in that there was insufficient evidence concerning their author for them to be admitted in evidence. The government's contention is that Raymond Pape, a Crane official, wrote the notes at the Palm Beach meeting. In support of their position, government counsel introduced a stipulation by all counsel that the HCA notes were found in Crane's files and were stapled together. The government also called a former secretary in Pape's department to make a lay handwriting identification of the notes.[11] She testified that she had done work for Pape and had been familiar with his handwriting "at times." She identified the handwriting on four of the six pages as resembling Pape's. She could not identify the writing on the two remaining pages.[12]

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11. The government represents in its brief that although Pape himself was technically available to be called as a witness, he was not called to identify the HCA notes because of the precarious state of his health. Indeed, Pape filed a motion to quash the government's subpoena to him on this ground. Although his motion was denied, the trial judge indicated his intention to take all possible measures short of granting Pape's motion to protect him. Moreover, the government represented to the trial judge that it would avoid calling Pape if at all possible. Pape died of heart failure shortly after the trial ended.

12. The witness testified as follows concerning each of the six pages:

(1) GX-551: "As I remember, it looks as if it could be Mr. Pape's but I can't be sure right now."
(2) GX-552: "[I]t resembles Mr. Pape's."
(3) GX-553: "It looks like it could be Mr. Pape's."
(4) GX-554: "There really isn't too much hand-

Appellants contend that since a substantial danger of a wrongful attribution of guilt existed if these documents were erroneously identified, no less than a "positive, unequivocal identification of the handwriting must be required." In fact the weight of authority requires only that a *prima facie* case of the alleged author's identity be established for the documents to be admitted. See generally 3 WIGMORE, *Evidence*, §693 *et seq.* (1940); MCCORMICK, *Evidence* §189 (1954). The ultimate issue of their authorship and the probative weight to be afforded them is for the jury. We conclude upon a reading of the record that the requisite prima facie case as to the four pages identified by the secretary was established. Thus, we hold that the trial judge did not abuse his discretion in admitting them.

Two of the pages were admitted without any handwriting identification. The jury was instructed that these pages might be compared with the other four pages for handwriting similarities should the other four be determined to be Pape's. Appellants challenge the propriety of allowing the jury to make such a comparison. They assert that the standard for comparison — the four pages — must be "admitted or proved" to be genuine before they may be used for comparison purposes. They further assert that the evidence was insufficient for the trial judge to properly determine the genuineness of the handwriting on the four pages so that they could be used as a standard of comparison.

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writing on here to say too much about it. . . . . I can't really say."

(5) GX-555: "That appears to be Mr. Pape's."

(6) GX-556: "I can't be sure about this one."

Where documents are admitted for purposes other than handwriting comparison, they may be used by the jury as a standard for handwriting comparison if the handwriting is admitted or proved to be that of the alleged author. *Williams v. Conger*, 125 U. S. 397, 411-15 (1888); cf. 28 U.S.C. §1731. The vast weight of authority requires that the trial judge determine whether the genuineness of the handwriting on the documents to be used as the standard is sufficiently proved. E.G., *United States v. Swan*, 396 F.2d 883 (2d Cir. 1968); *Citizens' Bank & Trust Co. of Middlesboro, Ky. v. Allen*, 43 F.2d 549 (4th Cir. 1930); 7 WIGMORE, *Evidence* §2020 (1940). In those jurisdictions where the trial judge is required to make the initial determination of genuineness the courts have adopted differing standards of proof. We believe the proper standard requires that there be sufficient evidence so that a jury finding of genuineness would not be subject to reversal as against the weight of the evidence. See *United States v. Swan*, supra.

In view of the present state of the law as developed above, we are convinced that the trial judge, had he considered this question directly, could only have properly held that the four pages were appropriate for jury use as a handwriting standard.[13] We say this because

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13. In view of our disposition of this issue, we need not decide at this time whether the requirement of an initial determination of genuineness by the trial judge ought to be eliminated and the question of genuineness both as to the standard and the other documents be left solely to the jury. Such a course has been suggested by some commentators. See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, Article IX, Rule 9-01 (March 1969).

the evidence supplied by the lay handwriting witness, a former Crane employee, in conjunction with the fact that the HCA notes were subpoenaed from Crane's PFMA file, were stapled together, and were internally consistent in content convince us that a jury finding that the four pages were in Pape's hand would be fairly supported by the evidence. Thus, we conclude the four pages were properly before the jury for use as a handwriting standard.

The appellants challenge the judge's instruction on the HCA notes in this connection as well. They contend that the instruction assumed that the four pages to be used as a handwriting standard were in Pape's hand when in fact that very issue was in dispute. We have read the instruction and do not find that it contains such an assumption.

The appellants' final argument concerning the admissibility of the HCA notes is that they were irrelevant and immaterial because the time, place, and circumstances of their making were not brought out. The notes reflected proposed prices for products which the American Standard worksheet contained. Some of the prices on the worksheet were crossed out or circled and changes were penciled in. The HCA notes were similarly marked to show these changes. Moreover, general policy statements written in pencil on the worksheet were also recorded in the HCA notes. Most convincing of all, however, is the fact that the American Standard proposed prices, which were reflected in the HCA notes found in Crane Company's files, were in some instances only tentative prices which were changed before their public announcement. The inescapable conclusion is that Crane Company had pre-knowledge of American Standard's

proposed prices. Even without knowing the source of this information, that evidence would be relevant and material to the question whether a price-fixing conspiracy existed.

Appellants next assert that the court erred in permitting the government to lead witnesses in critical areas. They concede that the trial judge has a broad discretion but they assert in effect an abuse of discretion. Considering that the government's non-expert witnesses were defense oriented we cannot find from an examination of the record that the trial court abused its discretion. Indeed, we think the record is replete with answers by such witnesses establishing a foundation for the use of leading questions. Nor can we find, as appellants contend, that the "cross-examination" device was so employed by the government on its witnesses as to have an adverse effect on the reliability of their testimony. We also find without merit appellants' contention that by permitting government witnesses to testify in terms of impressions or conclusions in so-called critical areas, the trial judge substantially impaired their right of cross-examination.

Appellants also contend in a somewhat oblique fashion that the co-conspirator hearsay exception deprives them of their Sixth Amendment right of confrontation. We note, however, that a decision of this court holds that the Confrontation Clause ruling in *Bruton v. United States*, 391 U. S. 123 (1968), did not invalidate the hearsay exception rule in conspiracy cases. *Parness v. United States*, 415 F.2d 346 (1969). This view has been adopted in other circuits. *United States v. Lawler*, 413 F.2d 622 (7th Cir. 1969); *Campbell v. United States*, 415 F.2d 356 (6th Cir. 1969). Moreover the United States Supreme

Court held in 1924 that the conspiracy exception did not deny a defendant his right of confrontation. *Delaney v. United States*, 263 U.S. 586.

Appellants have called our attention to *California v. Green*, . . U.S. . ., decided June 23, 1970, which they say supports their contention that use of the co-conspirator exception to the hearsay rule violates the Confrontation Clause. In *Green* the court held in a non-conspiracy criminal case that "the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination." Although the Court stated that it had no occasion in *Green* "to map out a theory of the Confrontation Clause that would determine the validity of all such hearsay 'exceptions' permitting the introduction of an absent declarant's statements," its opinion suggests the use in criminal cases of such exceptions to the hearsay rule will be subject to careful scrutiny by the Court.[14]

We do not find that *Green* alters our conclusion that we are bound by holdings that use of the co-conspirator exception does not violate the Confrontation Clause. Nevertheless, we have examined the record for hearsay declarations of nontestifying declarants. We have concluded that, even if the co-conspirator exception be deemed a violation of the Confrontation Clause where

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14. Mr. Justice Harlan, concurring in *Green*, stated his conclusion that "the Confrontation Clause of the Sixth Amendment reaches no further than to require the prosecution to produce all available witnesses whose declarations it seeks to use in a criminal trial." A Confrontation Clause challenge to the co-conspirator exception has been made in *Evans v. Dutton*, 400 F.2d 826 (5th Cir. 1968), prob. jur. noted 393 U.S. 1076 (1969).

the declarant does not testify, the rule's application in the present case was harmless error under Chapman v. California, 386 U.S. 18 (1967).

Appellants' specific claims of prejudice are sketchy and conclusory.[15] Basically, they complain that incriminating statements of Cuneo and Pape were introduced although neither appeared on the stand. Pape's "testimony," they say, "came in through hearsay testimony of Cuneo and Schambach and through the HCA notes." Cuneo's "testimony," they say, came in through the hearsay statements of Pierson and Callanan.

We have specifically reviewed the testimony of Callanan, Cuneo, Pierson and Schambach (Pape's subordinate at Crane), as well as the HCA notes, for statements attributed to Cuneo and Pape. We have also reviewed the testimony of the other government witnesses for statements attributed to nontestifying declarants. We have found surprisingly few such statements. Some of these statements are probably not hearsay at all;[16] that is, they are not "testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of the matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter."[17] McCor-

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15. They have made little attempt to document their claim by specific page references to the record.

16. E.g., N.T. 978 (J.A. 361a), 989 (J.A. 365a), 1008 (J.A. 369a), 2287 (J.A. 204a), 2469 (J.A. 214a), GX 318.

17. "It does not follow that, because the words in question are those of a third person, they are necessarily hearsay. On the contrary, it happens in many cases that the very fact in controversy is whether such things were

MCCORMICK, Evidence (1954), at 680 (1954). The HCA notes, for example, clearly were not offered for the truth of their contents and did not rest for their value upon the credibility of Pape or anyone else. See McCORMICK, supra, at 683-88.

The instances of true hearsay declarations by persons who did not take the stand amounted at best to a handful.[18] In any case, none of the statements attributed to nontestifying declarants was strongly incriminating. The sum of its weight was extremely small and insignificant when the record is considered as a whole. In light of the compelling strength of the government's case, we can say beyond a reasonable doubt, that the admission of hearsay statements of nontestifying declarants did not affect the outcome of the case. *Chapman v. California*, supra.

Appellants also assert that, assuming the validity of the co-conspirator exception, the trial judge committed error in not requiring the government first to prove *prima facie* by the acts and declarations of each appellant the existence of the conspiracy and the participation therein by each appellant before admitting the acts and declarations of each conspirator against all appellants. This court is well aware of the danger of finding guilt by mere association which is inherent in a conspiracy trial involving numerous defendants. See the concurring opinion of Justice Jackson in *Krulewitch v. United States*, 336 U.S. 440, 445 (1949). However, we

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spoken, and not whether they are true." *State v. Wentworth*, 37 N.H. 217 (1858), quoted in 6 WIGMORE, *Evidence* § 1766, at 179 (1940).

18. E.g., N.T. 1939-29 (J.A. 190-91a), 2016-20 (J.A. 298-300), 2183 (J.A. 330).

note that the trial judge was faced with a difficult order-of-proof problem because of the multi-step nature of the alleged conspiracy and because the government was not able at the very outset to show the requisite involvement of every defendant. The control of the order of proof was a matter within the discretion of the court. See *Ilco Corp. v. United States*, 389 F.2d 1009, 1019 (9th Cir. 1968). We find no abuse of discretion in the trial judge's rulings on the admissibility of the hearsay evidence in this conspiracy case.

The appellants assert, however, that at the time the hearsay evidence was received the trial court erroneously refused to give cautionary instructions to the jury with respect to the limitations on the use of hearsay evidence. Assuming that such an instruction would have been desirable,[19] we fail to find where the appellants requested such limitations at the pages of the transcript cited in their brief. In any event, by the time the first two government witnesses had finished testifying, a *prima facie* case of conspiracy had been made out involving all the defendants with the possible exception of appellant Decker who was later tied in.[19]

Appellants next contend that the government's evidence fatally varied from the one-count charge in the indictment. Appellants' position appears to be that the proof tended at best to show two or more separate conspiracies and thus a variance existed because only one conspiracy was charged. We think the short answer is that the evidence was consistent only with the exis-

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19. We think the above discussion is also a complete answer to appellants' argument that they were denied the right to an individual determination of their guilt or innocence.

tence of one overall conspiracy as described in the indictment. We say this because the separate means and methods were connected to each other not only by a common plan to affect prices in the plumbing fixture industry, but also by a substantial identity of each of the defendants and co-conspirators in agreeing to and carrying out the challenged price moves. Moreover, the evidence also showed that more than one phase of the conspiracy was frequently discussed at each of the conspiratorial meetings, especially at the initial September 17, 1962 meeting in Quinn's room at the Sheraton-Chicago Hotel. The fact that each defendant's proved participation may not have been identical to that of the others does not itself multiply the number of conspiracies.

Appellants also contend they were denied a fair trial because the trial judge erroneously excluded or limited their evidence. In furtherance of this contention, the appellants cite four specific evidentiary rulings by the trial judge which were allegedly erroneous.

1. *The Beckman Charts.* Through its expert economic witness Dr. Donald Beckman, Kohler offered 107 charts graphically representing Kohler economic data for the years 1950 through 1967. The trial court restricted Kohler's graphic economic evidence to the four year period covered by the indictment[20] on the theory

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20. In the interest of precision we note that the court ruled that the charts would conform to its temporal limitation if they included all of 1962 although the indictment charged the conspiracy started sometime in September of that year. In the interest of convenience we shall refer to the time period contemplated by the court's ruling as the "indictment period."

that any economic evidence before or after the indictment period was irrelevant. We understand the trial judge's desire to avoid remote evidence in view of the magnitude of the trial and the potential for confusing the jury. However, we have no doubt that in this case evidence of the preceding two years and of the year following the end of the alleged conspiracy would not have suffered from that defect.

Appellants contend that they were substantially prejudiced by the trial court's temporal limitation because Dr. Beckman was unable to utilize all 107 of his charts. In fact, however, the trial judge indicated he would admit the charts if they were modified to reflect data limited to the indictment period and did admit these charts so modified. Thus, it is clear the trial court's ruling did not preclude the use of any charts and did not substantially harm the appellants' defense for that reason.

The appellants' contend, however, that the charts as amended to reflect only the indictment period were much less convincing in support of Dr. Beckman's testimony than they would have been if admitted as originally constructed. Thus, they claim that the restriction on these charts substantially diluted the effect of Dr. Beckman's testimony. We cannot agree. Dr. Beckman testified at some length with the aid of those of his charts which were admitted. His testimony was forceful and direct and in view of his distinguished credentials as an economic expert could hardly have been easily dismissed by the trier of fact. His thesis in simple terms was that, based on the relevant economic indicia of competitiveness, Kohler's pricing activities could only be the result of competitive forces in the marketplace.

The strength of Dr. Beckman's testimony is exemplified by the following quotation which is but one of several such statements he made during his testimony.

> "So the conclusion that seemed to me inevitable was that no prudent businessman would do such a thing unless he was forced to do it by economic forces, and if there had been an agreement, it certainly would not have been for the purpose of selling below costs and lowering the income of the company. So it [Kohler's pricing practice during the indictment period] had to be, in my judgment, *a result of highly effective competition; in fact of vigorous competition.*" (N.T. 8851) (emphasis added)

In addition, those charts which were admitted strongly support Dr. Beckman's analysis of the indictment period. Moreover, his testimony dealt with economic data not shown on his modified charts so that the substance of the material excised by the trial court's ruling was supplied by his oral testimony. For these reasons we conclude that the temporal limitation imposed on Kohler's charts, while error, did not substantially harm either Kohler or the other appellants.

2. *American Standard Field Reports.* Appellants also assign as error the district court's refusal to admit American Standard's exhibits 99 to 104. These exhibits were characterized by an American Standard witness as memoranda and documents made up by American Standard's Pricing Service in the regular course of its functions in recording information from field offices with respect to competitive activity and prices offered by competitors. They were offered as business records, pur-

ment to 28 U. S. C. §1732, to prove that American Standard and its competitors were not limiting discounts to customers as the indictment charged they had agreed to do. The district court refused to admit these exhibits for the truth of their contents as business records.

These exhibits were in the main based on information supplied by sources whose trustworthiness could not be ascertained from the documents themselves and was not established by oral testimony. Moreover, because the exhibits concerned transactions to which American Standard often was not a party, the normal presumption that a party keeps accurate records of its transactions is not available here. Because the regularity with which these records were kept does not tend to establish their accuracy, we believe the reasoning of the Ninth Circuit is particularly applicable here. In a landmark case in this area, the Ninth Circuit held that exhibits substantially similar to those offered here were not admissible as business records *Standard Oil Co. of California v. Moore*, 251 F.2d 188, 212-17 (9th Cir. 1957) *cert. denied* 356 U. S. 975 (1958). Since we believe trustworthiness of the documents is the touchstone, we are not inclined to adopt the contrary reasoning of the Sixth Circuit in *Continental Baking Co. v. United States*, 281 F.2d 137, 168 (6th Cir. 1960). See *Palmer v. Hoffman*, 318 U. S. 109, 113-14 (1943). Thus we conclude the rejection of these exhibits as business records was proper.

Following the court's ruling, these exhibits were reoffered "as typical of the program or policy followed or the procedure followed by [American Standard] district managers throughout the United States." (T. 6051).

The court again refused the exhibits. The basis for this ruling was that the exhibits were cumulative in that a similar exhibit had already been introduced to illustrate the testimony concerning American Standard's method of gathering this information. We agree the exhibits were properly excluded on this ground.

3. *Kohler Exhibit 132.* Appellants contend the trial court erroneously excluded this exhibit entitled "Some Examples of Competitive Quotations—1963" which was offered to prove that Kohler and its competitors had not maintained maximum discount levels. The exhibit is a listing of over 600 specific job quotations during 1963 where Kohler quoted discounts which exceeded levels the government claimed the appellants had agreed to maintain. On voir dire it was established that some 2,000-2,500 quotations were made in 1963 and that these 600 odd examples listed in the exhibit were substantially all the quotations above the allegedly agreed upon maximum percentages. Yet the exhibit, by its title and contents, in no way revealed these facts. Thus, we agree with the government that the exhibit was to some extent misleading. On the other hand, the mere existence of a significant number of quotations exceeding the alleged maximum levels was relevant to the appellants' defense. While we might have ruled differently, however, we are not convinced the trial judge's exclusion of this exhibit in the form offered amounted to an abuse of discretion. Moreover, in view of the extensive defense testimony concerning the existence of these discounts, we believe the jury was to a large extent made aware of the appellants' proof on this point even without the exhibit.

4. *The Commerce Department Letter.* Kohler offered a multi-part exhibit containing a letter from an

official of the Commerce Department to prove that the appellants had not misled that Department concerning the general acceptance of regular enamel products in the industry. The government claim was that the appellants had deceived the Commerce Department on this matter in furtherance of their alleged agreement to change the Commercial Standard. The letter was dated October 18, 1932 and arguably demonstrated that the Commerce Department at that date believed that regular enamel products were standard in the industry, which in appellants' view would tend to weaken the government's case on this issue.

The letter was objected to on the ground that it referred to other correspondence which was not part of the submission, and thus, in the government's view, was objectionable hearsay. The trial court rejected the exhibit on the independent ground that its admission would violate the best evidence rule. The court ruled that the author of the letter "is the best evidence here, not his letter." Understandably the government does not argue on appeal that either the hearsay or the best evidence theory justified exclusion of this letter. We are convinced from our reading of the record that the letter ought to have been admitted although its probative value was minimal. The hearsay objection is groundless and in our understanding the best evidence rule does not require the author of the document to produced if the original document is offered.

However, even though we conclude the court erroneously excluded this exhibit, we are not convinced that the prejudice suffered by the appellants was substantial.

Jury Charge and Submission of the Case to the Jury

Appellants claim that they were substantially prejudiced by the trial court's conduct in connection with the preparation of his charge to the jury. Their first claim is that the court committed reversible error because it flatly refused to rule on each of their joint requests for points for charge. In fact the trial court did flatly refuse to rule on the original sixty-seven requests submitted by the appellants on the grounds they were too voluminous and general to be of any aid to him in preparing his charge. The government's requests were treated similarly. The appellants claim this refusal to rule on each of their requests so impeded counsels' preparations for argument to the jury that the appelants were denied effective assistance of counsel.

We note that the trial judge has broad discretion in ruling on points for charge. In this case appellants' points were prolix, imprecise, and often intertwined evidentiary assumptions with law in a highly partisan manner. Moreover, shortly after these requests were submitted the court informed counsel that he would give them a reasonable time to resubmit their requests in an acceptable form. Indeed supplemental requests were submitted and the trial judge ruled on them in substance. On this record, we conclude the trial judge did not abuse his discretion by refusing to rule on each of the appellants' initial requests. See 8 MOORE'S FEDERAL PRACTICE, Paragraphs 30.03 [1] and [2] (1969).

The appellants further contend that the trial court failed to accurately inform them of the contents of his charge and that they were substantially prejudiced in

their arguments to the jury for this reason. We note that the judge did advise counsel at some length of the substance of the points on which he would charge. However, appellants still claim that they were harmed in this connection and point to three specific instances of the substantial prejudice they suffered because they remained uncertain as to the substance of his charge on some crucial points. First they claim that they argued to the jury that an acquittal was required if the jury found that several conspiracies existed rather than one continuing conspiracy as was charged in the indictment. They claim they were prejudiced because the government argued a different version of the law and the judge failed to charge on their separate conspiracies theory. As we indicated previously, this record could support a finding of no more than a single continuing conspiracy. Moreover, the trial court told the appellants that he would not charge on a multiple conspiracy theory. Thus, if the appellants actually believed they would get such a charge or were entitled to one, they were self-misled, not judicially. There was no error here.

Appellants' second contention in this regard is that the court's pre-charge uncertainty concerning whether it would charge that an agreement to eliminate a product was a per se violation of the Sherman Act caused them not to argue this point to the jury for fear of subsequent contradiction by the trial judge. In fact the trial judge indicated that while he had some reservations, he was inclined to charge along the lines requested by the appellants. Appellants never advised the judge that they required a definite ruling from him on this point in order to aid them in the preparation of their closing arguments

to the jury. Indeed, counsel for Kohler did argue to the jury on this point as follows:

> "[T]here is no dispute that there was a change made in the Commercial Standard . . . eliminating from the standard any reference to non-acid-resisting enamel ware, and that all . . . or substantially all of them announced to the public their intention to discontinue the manufacture of regular enamel plumbing fixtures."
>
> "Now, there is no question that those events occurred. Although the government spent a good part of its case proving those facts, they are not in dispute and *they are not illegal; not a single one of them is illegal in itself. In and of itself, it was perfectly lawful.* . . ." (N.T. 9659-60) (emphasis added)

In these circumstances, we do not find that the trial judge committed error. Appellants also claim that the court failed to charge on this point and thus the jury could have convicted because they believed such an agreement, to eliminate a product, standing alone, was proof of guilt. A reference to the court's charge belies the claim that this matter was not satisfactorily covered in the charge.

The appellants' final contention is that they were harmed because the judge gave a "missing witness" charge although neither the government nor the appellants requested it. In view of the many allusions to "missing witnesses" by counsel for both sides in their closing arguments, we do not believe the judge abused his discretion by so charging.

In connection with the jury charge itself, the appellants claim five errors. First, they contend the trial

judge failed to charge the jury with respect to the responsibility of an "acceptor" of the Commercial Standard. They claim they were substantially prejudiced because the jury was not made aware that the elimination of regular enamel products may have been occasioned by the general acceptance of the Commercial Standard rather than a conspiratorial agreement. In effect the appellants wanted a charge that acceptance of the Standard indicated an intention to follow it. The trial judge gave a lengthy charge concerning the Commercial Standard in which he dealt with the nature of the Standard and its legal effect. In view of the comprehensive charge on this matter, we find no merit in appellants' argument.

Second, appellants assert they were prejudiced by the trial judge's failure to charge that the jury should consider whether the appellants tried to conceal their activities in evaluating whether illegal agreements were made. Assuming such a charge would have been proper, we do not believe the trial judge abused his discretion by not giving this charge on a point of at best tangential significance.

Third, appellants contend that the judge failed to charge on their specific theories of the case, viz. (a) he did not state "the defendants' theory that the January, 1963, vitreous china price increase came about as a result of the direct order of the . . . chief executive officer of Crane Co., and the subsequent independent decisions of the defendants"; and (b) that "the discontinuance of the manufacture of regular enameled cast iron bathtubs and lavatories was the result of the independent acceptances by the defendants of the Commercial Standard

and not of any illegal agreement." The judge's charge adequately covered these points in our view.[21]

Appellants' fourth contention with respect to the charge is that the court failed to accord any weight to appellants' economic evidence. In fact the court reviewed many of Dr. Beckman's conclusions and attributed them to the other appellants as well as Kohler. The appellants complaint, however that the judge unfairly charged on the permissible inferences to be drawn from pricing patterns. They contend that while he charged that similarity of pricing was some evidence of agreement though certainly not conclusive, he failed to charge that dissimilarity in pricing was some evidence of no agreement. While we agree with appellants that such a charge would be proper, in view of the court's lengthy review of Dr. Beckman's conclusions that Kohler's pricing established the absence of an agreement, we do not believe the court abused its discretion in this matter.

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21. He charged that the appellants contended:

"That economic conditions dictated the prices which they charged and even if there was uniformity with other competitors' prices . . . such prices were the result of market forces and not the result of agreement."

He further charged that the appellants contended:

"That American Standard sought the change-over from regular enamel to acid-resisting enamel by means of the Commercial Standard, legally, as advised by counsel." (J.A. 1942a)

Similar instructions were given for Held and Kohler (J.A. 1944a), and Borg-Warner's contention that it was factually distinguishable from the other defendants on this issue was explicitly noted as well. (J.A. 1945a)

Appellants' final argument is that the trial judge erred in charging that "the things the defendants did and said at the time, may . . . be weightier than the things they say thereafter." And that "assertions of innocence by such officers may reflect partly legal as well as factual contentions." They claim this charge, in effect, negated the impact of the testimony of defense witnesses. Passing over the fact that the appellants apparently did not object to this charge, we find no error in giving this charge on this record. *United States v. Chas. Pfizer & Co.*, CCH Trade Reg. Rep., Para. 73, 1219 (2d Cir. 1970) is clearly distinguishable on its facts.

Appellants contend that they were prejudiced when the judge gave the indictment to the retiring jury without first deleting the names of those defendants who had pleaded *nolo contendere*. They allege this prejudice arose because the jury must necessarily have inferred that these persons and corporations had been convicted of the crime charged. Thus, they contend, those persons who were listed in the indictment which the defense did not call would be presumed by the jury to be unfavorable to the appellants. The court instructed the jury both at the very beginning of the trial and at some length during his charge that they were not to speculate concerning the guilt of co-conspirators not defendants then on trial but named in the indictment. We are convinced on this record that the appellants did not suffer substantial prejudice in this matter. We also decline to hold that the trial judge abused his discretion in allowing an unmodified version of the indictment to go to the jury, although we think the better procedure would have been to cover the names when defendants so requested.

Appellants' next claim is that they were denied a fair trial because the court gave the case to the jury on a Friday afternoon rather than on the following Monday. Their assertion that "the jury could only have concluded that it was required to reach a decision on Friday night . . . [and] must have inferred that the court was in a hurry to convict the defendants" is groundless. There is absolutely nothing in the record to suggest that the trial court conveyed to the jury a desire for a quick verdict.

Brady v. Maryland and Jenks Act Claims

Appellants also contend that the government attorneys did not fulfill their obligations under *Brady v. Maryland*, 373 U. S. 83 (1963), and the Jenks Act, 18 U. S. C. §3500, to furnish certain materials to them. *Brady* held that due process requires that the prosecution not suppress evidence favorable to an accused that is material either to guilt or to punishment; the Jenks Act provides that, after a government witness has testified on direct examination, the government must produce any statement of the witness in its possession "which relates to the subject matter as to which the witness has testified." The government maintains that it has no *Brady* material and that it has complied fully with its duties under the Jenks Act.

Appellants first assert that the failure of the government to disclose to them prior to trial the grand jury testimony of Raymond A. Pape constitutes a violation of the *Brady* rule. Pape was formerly Vice President and General Manager of defendant Crane's Plumbing, Heating, Air Conditioning Group. As we have indicated, he did not testify at trial and died shortly thereafter,

on July 15, 1969. During the pendency of this appeal the government furnished his grand jury testimony to appellants and to this court. Appellants argue that Pape's grand jury testimony was *Brady* material because Pape denied before the grand jury that any price-fixing agreement was reached at the March 28, 1963 Palm Beach Biltmore meeting. They consider the government's arguing to the jury that the HCA notes were written evidence of the illegal agreement made at the Palm Beach meeting "as grave as the 'deliberate deception of court and jury by the presentation of testimony known to be perjured.'"

We have carefully reviewed all of Pape's grand jury testimony, particularly those portions called to our attention by appellants, and are convinced that the government did not violate *Brady* by not producing it prior to trial. We note that while Pape denied that any formal price-fixing agreement[22] was made at Palm Beach he did admit that he had discussed prices with competitors at PFMA meetings. He also admitted that at least two months prior to their public announcement he knew what the new acid-resistant prices would be because he "had verbal discussions so that {he} was fairly certain what the other people would do." Grand Jury N. T.

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22. It should be pointed out that his denials seem in part to be based on an erroneous view of the law of conspiracy. See, e.g., Grand Jury N. T. 3830:

> "... I can't picture or remember anybody agreeing. I would say that I had the general idea when we left the meeting that these were the prices. Now, that is sort of the indirect feeling of an agreement, but I can't picture everybody just saying it. But I would say that my feeling leaving the meeting was that these were the prices."

3842-47. Moreover, as to the HCA notes, Pape unequivocally admitted that they were in his handwriting, and stated that "apparently someone was telling me what American Standard was going to charge," and that he felt the figures on the notes "represent new prices that American Standard was going to charge when they came out with their acid-resisting enamel." Grand Jury N. T. 3673-74. He further testified in part as follows about the HCA notes:

> "On this stationery that includes the Palm Beach Hotel, and there are several hotels on here, the one that I had previously felt that it couldn't have been Palm Beach, but after reading these [refreshment] documents, I feel that this could very well have been that early where I got this detail. This is the one that I say was American-Standard because it has American-Standard's specific prices and the names of the American-Standard tub." Grand Jury N. T. 3844.

On the whole, Pape's grand jury testimony was extremely incriminating and we cannot say that it contains any material exculpatory evidence.

Appellants also assert that the government's failure to reveal the contents or existence of certain statements in its possession by William E. Kraemer was a violation of *Brady* and the Jenks Act. Appellants first learned of the existence of these statements while this appeal was pending during the course of Kraemer's deposition which was being taken in certain civil treble damage actions against the indicted plumbing fixture manufacturers. Believing that these statements might contain *Brady* or Jenks material, appellants filed a motion in

this court seeking to compel the government to give them copies of these statements and to make them part of the record. By order of April 21, 1970 another panel of this court directed the government to produce the documents in question for *in camera* inspection by this panel. The government produced 16 documents pursuant to the April 21 order and represented that four other requested documents are not in its files and that it has no record that they ever were.

We have carefully examined all of the Kraemer statements. Most of them contain material that is exceptionally damaging to defendants. We have found no material exculpatory evidence in any of the statements. Moreover, we do not believe that appellants' mere speculation about materials in the government's files requires the district court or this court under *Brady* to make the materials available for their inspection. The possibilities for abuse in such a procedure are manifest. Cf. *United States v. Crisona*, 416 F.2d 107, 116 (2d Cir. 1969), *cert. denied* — U. S. — (1970); *United States v. Evanchik*, 413 F.2d 950, 952-53 (2d Cir. 1969); *United States v. Harris*, 409 F.2d 77, 80-81 (4th Cir.), *cert. denied* 396 U. S. 965 (1969). It follows that appellants' motion to have the Kraemer statements produced to them must be denied.

Appellants also contend that the Kraemer statements should have been produced at trial pursuant to the Jencks Act. They correctly point out, however, that "Mr. Kraemer was called as the final prosecution witness at trial but was not asked any questions by the prosecutor concerning alleged price fixing and merely

identifies briefly certain meetings of the PFMA."[23] He was not cross-examined by any of the appellants. His grand jury testimony and what the government represented to be his Jenks Act statements had been previously produced to appellants.

We have reviewed Kraemer's trial testimony and have examined the Kraemer statements with a view toward the application of the Jenks Act. Only one of the documents can be considered to "relate to the subject matter of the testimony of the witness." This document lists certain meetings of the PFMA, including three of the meetings the minutes of which Kraemer identified on the stand. There is no conflict between the dates shown on the list and the minutes Kraemer identified. Moreover, appellants at the time had copies of these minutes. Indeed, there was no dispute about the dates of the meetings in question at trial. Under these circumstances we are convinced that the government's failure to produce the document which related to Kraemer's testimony was harmless error. See *United States v. Kahaner*, 317 F.2d 459, 473 (2d Cir.), *cert. denied* 375 U. S. 835 (1963).

Separate Appeals

Daniel J. Quinn

The only argument raised by appellant Quinn in his separate brief is that the trial judge erred in refusing to permit his counsel to question him on direct examination about his health so that the jury could properly evaluate his demeanor. Quinn, who was 68

23. Appellants' Response and Appendix to Government's Motion to Show Cause, p. 34a.

years old at the time of trial and in ill health, testified for two days on direct examination and seven days on cross-examination. Quinn asserts that to assist the jury in evaluating his demeanor and to take into account any effect his illness might have had on his demeanor, his counsel toward the close of direct examination asked him if he had ever been under a doctor's care for any serious health problem since his retirement. The court sustained the government's objection to the question, noting:

> "I have observed the witness all the way through too. I find nothing here that shows other than a very good witness, one who is responsive, one who is alert and shows no signs of any conduct because of any physical impasse.
>
> "This is a proper question presented to the court in the event only there is a conviction. But it is improper here because prejudice might outweigh the facts."

A trial judge in balancing the probative value of evidence against possible prejudicial effect is vested with broad discretion. The trial judge here observed the witness testify and concluded that the competing interests should be balanced in favor of excluding evidence of Quinn's poor health. On this record we cannot say that his ruling was an abuse of discretion.

Joseph J. Decker

The only argument raised by appellant Decker is that the trial judge erred in refusing to grant his motion for judgment of acquittal. We have already indicated, however, that the evidence of Decker's participation in

the fourth phase of the conspiracy, the price fixing concerning the changeover to all acid-resistant fixtures, was strong and certainly sufficient to support the jury's verdict.

Kohler Co. and Norman R. Held

Appellants Kohler and Held challenge the sufficiency of the evidence against them. We have already concluded that the evidence that Held participated in all four phases of the conspiracy was strong and certainly sufficient to support the jury's verdict. Kohler, however, argues that there was insufficient evidence to support a finding that any criminal activity of Held was done in the course of his employment with Kohler and within the scope of his authority. We disagree.

Kohler asserts that there was no evidence to support a finding that Held had authority to determine its prices. Kohler also emphasizes that it was against its rigid anti-fraternization policy for Held even to have social contact with its competitors. However, the government points out that Held was Kohler's sales manager and a director of the corporation. Moreover, even though Held testified that he had no actual authority to publish prices, he admitted that he was the official who recommended price changes to Kohler's chief executive and that he had unlimited authority over the company's discounting or "job pricing."

We think the jury could have found that Held's illegal actions were within the scope of his authority. There was testimony by Callanan that at one of the conspiratorial meetings Held claimed "that he was speaking for his company." It would also be reasonable to conclude

that Heid's authority to recommend prices enabled him to commit Kohler to the conspiracy. Since Kohler adopted the conspiratorial prices and Heid participated in meetings at which those prices were agreed to, the jury could reasonably have concluded that Kohler's price moves were taken as a result of the conspiracy. Moreover, the fact that Heid may have been acting contrary to his instructions about fraternizing with competitors could hardly negate an inference that he was motivated at least in part by a desire to serve Kohler, and thus acting in the course of his employment. *See Restatement (Second) of Agency* §§228 *et seq.*

Kohler also asserts that it was prejudiced by the court's charge on a corporation's responsibility for its agents' acts and by its refusal to admit certain evidence concerning the rigor of its antitrust compliance policy. Assuming it was error to reject certain of Kohler's evidence concerning its corporate policy of strict compliance with the antitrust laws, we do not think Kohler was prejudiced in any way. The evidence was of marginal relevance and substantially cumulative.

As to the agency instruction, Kohler contends in substance that the court failed to say that the jury had to find both that the agents' acts were within his authority and within the course of his employment, that is, performed with the intention of benefiting the employer. In fact, the jury was so instructed.

The relevant instructions were as follows:

"A corporation, itself, cannot attend a meeting or make decisions; it must act through agents, such as its officers, directors and employees. In order for a corporation to be responsible for the acts or state-

ments of one of its agents it is not necessary that the corporation specifically authorize the agent to commit the act or make the statement. A corporation is legally bound by the acts and statements of its agents done or made within the scope of their employment or their apparent authority. Acts within the scope of employment are acts done on behalf of a corporation and directly related to the performance of the type of duties the employee has general authority to perform. Apparent authority is the authority which outsiders could reasonably assume that the agent would have, judging from his position with the company, the responsibilities previously entrusted to him, and the circumstances surrounding his past conduct.

"When the act of the agent is within the scope of his employment or his apparent authority, the corporation is held legally responsible for it, although what he did may be contrary to his actual instructions and may be unlawful.

"If you conclude that an agent of a defendant corporation, acting on behalf of the corporation and within the scope of his employment or his apparent authority, engaged in a price-fixing conspiracy, then it is no defense that the corporation had instructed its employees orally or in writing to comply with the antitrust laws and not to engage in price discussions with competitors."

Thus, the judge charged in substance that the corporation would be responsible if the agent acted "on behalf of the corporation and within the scope of his employment or his apparent authority." When this instruction

is viewed in light of the judge's definitions of "scope of employment" and "apparent authority," it is clear that the agency charge was not erroneous. We also note that one of appellants' points for charge stated that a corporation is criminally liable for an agent's unlawful acts done "within the scope of his authority"; no mention was made of the "course-of-employment" or "on behalf of" element. Finally, we point out that Kohler's counsel did not comply with the requirement of F. R. CRIM. PROC. 30 that, before the jury retires to consider its verdict, he state distinctly to the trial judge the matter in the charge to which he objects and the grounds of his objection. Kohler's counsel did not make the trial judge aware that he objected to the way these elements of corporate responsibility were presented and thereby give him a chance to conform his instruction to Kohler's wishes before the jury retired.

Kohler also asserts that the agency instruction was "oversimplified" because it "did not discuss the elements in the case which might aid the jury to determine whether anything done by Norman Held could have been done within the course of his employment by Kohler . . . ." We hardly think that the judge's failure to review the evidence on this point with the jury would be error. Moreover, the judge did review some of Kohler's contentions on the agency point earlier in his charge.

Kohler's final criticism of the agency instruction is that it did not state that the jury must be satisfied beyond a reasonable doubt that the elements for corporate responsibility were present. This contention is without merit. Near the beginning of his charge, the trial judge made clear that a defendant can be found guilty only if

the jury is satisfied beyond a reasonable doubt as to every essential element of the crime. The court was not required to reiterate the reasonable doubt requirement in the agency instruction. In any event, this claim was not called to the judge's attention in the Rule 30 colloquy.

Borg-Warner Corporation

Borg-Warner argues in its separate brief that the evidence of its participation in the conspiracy was insufficient to support a conviction. We have already indicated our conclusion to the contrary; there was strong evidence that Borg-Warner participated in all four phases of the conspiracy.

Borg-Warner's other separate argument is that it was prejudiced in certain respects by errors in the court's charge. Its first argument deals with the "missing witness" instruction that was given. Near the beginning of his charge, the trial judge gave the standard instructions on the presumption of innocence. In part, he charged as follows:

> "Since the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has a right to rely upon failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out on cross examination of witnesses of the prosecution. The law never imposes upon a defendant in a criminal case the burden or duty of producing any evidence."

However, since in their closing arguments counsel for all the parties except Kohler urged the jury to draw inferences from the failure of an opposing party to call

certain witnesses, the trial judge endeavored to provide general guidance to the jury in its consideration of such arguments by charging as follows:

> "There have been some arguments here on the failure of a party to produce a witness or evidence, as the case may be. Where a party, without satisfactory explanation, fails to call a witness, who is known to that party, who has knowledge of material facts and whose interest or prejudice is in favor of such party, or would likely be in favor of such party, the inference is that his or her testimony would not sustain the contention of the party, if the witness were called. Also, where evidence which would be properly part of a case, is within the control of one party or the other, whose interest would naturally be to produce it, and without satisfactory explanation, the party fails to do so, the jury may draw an inference that the evidence would be unfavorable, if that evidence was presented at the trial. If the testimony of the witness or the evidence would be merely cumulative, these rules would not apply. So, too, where witnesses are callable and evidence producible by any party, these rules do not apply.
>
> "Now, whether you apply these rules depends upon what you find the facts to be."

Borg-Warner questions the propriety of this charge. First, it suggests that "[t]he net effect of such an instruction was to say that the defendant should have come forward and proved its innocence" and thus the charge "directly conflicts with the presumption of innocence." The short answer to this claim is that a missing witness charge has long been accepted as appropriate

even in criminal cases. See *Graves v. United States*, 150 U.S. 118, 121 (1893). Indeed, the following passage from *Graves* was recently quoted with approval by this court in *United States v. Restaino*, 369 F.2d 544, 547 (3d Cir. 1966):

> "The rule even in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable." 150 U.S. at 121.

Accord, *Brown v. United States*, 414 F.2d 1165, 1166 (D.C. Cir. 1969).

Borg-Warner also argues that the missing witness charge should have contained specific references to those witnesses to whom it would be applicable and should have explained the prerequisites to its application more fully. On this record, however, we cannot say that the trial judge abused his discretion in charging as he did. Finally, Borg-Warner seems to suggest that the instruction could not be applied to it because unlike the other defendants, "[c]ounsel for Borg-Warner did not suggest to the jury that they should infer from the government's failure to call a particular witness that that witnesses' testimony would have been adverse." However, we note that it is entirely clear from the record that Borg-Warner's counsel did argue to the jury that the government did not call Borg-Warner employee, Ray Bair because his testimony would have been unfavorable.

Borg-Warner also argues that it was substantially prejudiced by the trial judge's incomplete statement of its "theory of the case" in his charge to the jury. In

particular, Borg-Warner emphasizes[24] that the trial judge should have specifically instructed the jury that it was relying on the testimony of government witness Morris H. Vereeke, Borg-Warner's Sales Vice President, that no price at Borg-Warner was ever established as a result of any information obtained from price discussions with competitors. Initially, we have some doubt whether Borg-Warner's suggested instruction on this point was an accurate characterization of Mr. Vereeke's testimony. In any case, we believe that the trial judge did not abuse his discretion in selecting the evidence he commented upon in his charge. Moreover, Borg-Warner's counsel clearly emphasized his reliance on Mr. Vereeke's testimony in his lengthy summation to the jury.

CONCLUSION

The government's evidence of price fixing by the appellants was compelling. We note in conclusion that the government presented eyewitnesses and co-conspirators who clearly implicated appellants in the crime and largely corroborated one another. As to all appellants but Decker, we have concluded that there is strong evidence of their participation in all four phases of the conspiracy. When it is remembered that evidence of a defendant's participation in any one phase of the conspiracy was sufficient for a conviction under the one-count indictment, it becomes clear that the cumulative effect of the government's case was overwhelming. As to appellant Decker, there was clear and convincing evi-

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24. This is the only argument on this point raised by counsel for Borg-Warner in his post-charge colloquy with the trial judge. See F. R. Crim. Proc. 30.

dence of his participation in the fourth phase of the conspiracy.

It is true that we have found errors in a few instances but appellants are not entitled to hindsight perfection. Whether the errors be viewed in isolation or cumulatively we are completely satisfied that they did not deprive appellants of a fair trial or operate to their substantial prejudice. On the contrary, we are satisfied from our examination of the record in its totality that the appellants received a fair trial and that their conviction was entirely warranted from the evidence.

The judgments of conviction will be affirmed.

Judge Aldisert joins in this opinion insofar as it applies to the appellants, American Standard, Inc., in No. 18,182; Borg-Warner Corporation in No. 18,184; Joseph J. Decker, in No. 18,185; and Daniel J. Quinn, in No. 18,186.

ALDISERT, *Circuit Judge*, Dissenting in Appeal Numbers 18,183 and 18,187.

I would grant a new trial to Kohler Company, Appellant in No. 18,183, and Norman R. Held, Appellant in No. 18,187, because of what I consider improper and inflammatory conduct by the government attorney in the cross-examination of witness Held. This was fairly described in the majority opinion as references to "Kohler's purchase of guns, ammunition and tear gas, eviction of strikers, investigating the private lives of union officials, and other inflammatory topics."

The majority admit that "its potential for prejudice outweighed its evidentiary value," but conclude that because this incident occupied only one hour's time in a total of sixteen weeks it could not have affected the jury so as to deny a fair trial to these appellants. I disagree. I consider the improper cross-examination to possess a more sinister capacity.

Admittedly, what is posed is a close question. My brethren and I are in disagreement only as to where we place this error. I believe that it crosses the line and becomes so prejudicial as to justify the ordering of a new trial for these two defendants.

Even viewed from the most charitable vantage point, there was scant justification for the type of cross-examination, persisted in by the government and permitted to continue by the trial judge over the concerted objection of all defense counsel. Its ostensible claim to legitimacy, according to the trial judge, stemmed from a challenge to the credibility of the witness Held. But even here, it is most difficult, if indeed at all possible, to localize the specific statements in his brief rendition of the Kohler history which form the basis for the prolonged attack.

On direct examination he described early Kohler history, an account that ended in 1905. In response to the first question on cross-examination relating to the company's labor relations policies, he stated—and this is not challenged—that he was not in Kohler, Wisconsin, from 1954 to 1960, the years of the strike there. Yet he was subjected to a continuing barrage of "did-you-know" questions relating to a bitter chapter in industrial warfare, the facts of which, concededly irrelevant to the substantive issues of antitrust violation, were never presented testimonially other than from the questions of government counsel, and all of which had an explosive capacity for inflaming a Pittsburgh, Pennsylvania, jury.

Moreover, an examination of excerpts of this cross-examination set forth in the margin[1] discloses that it concludes with the astonishing statement of the government attorney: "And you understand . . . that the ques-

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1. Q. How were they between 1954 and 1960, Mr. Held?
   A. Well, first of all, I can't answer firsthand 1954 to 1960, because I was not on the scene.
   Q. Mr. Held, I asked you a question. Is it not a fact, sir, between 1954 and 1960 Kohler Company engaged in one of the longest and bitterest strikes in American history?
   A. Well, I wouldn't characterize it that way. I will agree with the length, but I won't agree with the bitter. Also involved here was an auto workers, union which had a contract that was geared to the production of automobiles. We are bathtub producers, that type of contract wouldn't work.
   Q. Then, you have no reason to buy guns and ammunition, do you, to break a strike?
   A. I don't know of any guns or ammunition.
   Q. Oh, you didn't know, sir, that during the course

tions which I have directed to you have absolutely nothing to do with any charge of the indictment that you have violated the law between 1962 and 1966?"

For the government to perpetrate and prolongate this slashing examination and then say that it had

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of the National Labor Relations Board hearings that Kohler Company was denounced for preparing for bargaining during the strike by purchasing guns, ammunition and tear gas?

• • •

A. Of my own knowledge, sir, I did not know.

• • •

Q. Do you know, sir, that in 1960 the National Labor Relations Board denounced your company for a number of unfair practices and that these practices included paying for and accepting from private detective agencies certain reports suggesting the possibility of bugging the union's hotel rooms during the course of the National Labor Relations Board hearing?

A. No, sir.

• • •

Q. Are you aware, sir, that in 1960 the National Labor Relations Board criticized Kohler Company for such practices among which were paying for and accepting from private detectives certain telephone checks and long distance calls from union headquarters?

A. No, I am not.

Q. Are you aware, sir, in the same hearing in 1960, that the same National Labor Relations Board denounced Kohler Company for hiring private detectives in that they investigated into the private life of the union's chief negotiator, together with the investigation of three international union officials?

• • •

Q. Mr. Held, did I not ask you more than ten minutes ago whether or not you read the hear-

"absolutely nothing to do with any charge of the indictment" raises the serious question of the very real purpose of the examination. It is particularly significant that the trial was held in the Western District of Pennsylvania, a community historically and currently the center of organized labor activity. With a jury drawn from this philosophical environment, the potential for

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> ings and the opinion of the National Labor Relations Board, and did you not answer, "Yes, but that was a long time ago"?
>
> • • •
>
> Q. Certainly, sir. In the same 1960 opinion of the National Labor Relations Board, are you aware, sir, that, in their opinion, criticism was leveled against Kohler Company because of the submission of a formal detailed plan calling, in part, for a system of secret plant informants and a comprehensive investigation of all new employees?
>
> A. No, I am not aware of that.
>
> • • •
>
> Q. Do you know, sir, whether or not the United States Court of Appeals found that Kohler Company engaged in anti-union espionage during the strike?
>
> A. I don't know. I can't answer that without reference.

The chambers conference was then held at which time the court was advised by counsel, "The course of inquiry which the government has chosen to pursue into this matter has not been into a logical examination of what probative value, if any, this matter might arguably have. But, it has been to select certain fragmentary details from the reported decisions of the National Labor Relations Board, and by the Court of Appeals for the District of Columbia, about the various legal proceedings which resulted from that strike, and to take those details which are most likely to inflame and prejudice the jury, and to make it impossible for them to act in a calm and

prejudice following an hour-long injection of collateral labor-baiting activities into an antitrust prosecution cannot be minimized.

My difference with the majority going only to the effect of this admittedly improper cross-examination, it does not become necessary to rehearse at length the appropriate principles of law.

I have concluded that the examination was designed to and did create an abhorrent image of these appellants,

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dispassionate manner with respect to the issues in this case." After a lengthy chambers conference, represented by twenty-one pages of the court record, the government attorney resumed the cross-examination the next day:

Q. You will recall yesterday afternoon that you were asked certain questions concerning Kohler's strike which occurred between 1954 and 1960. Do you recall that, sir?

A. Yes, sir.

Q. Did Kohler, as a company, ever own any of the homes in which the workers lived?

A. On occasions for short periods of time, as I recall. I would have definite information on that, Mr. Fricano [government counsel].

* * *

Q. And when the strike occurred, sir, Kohler Company served eviction notices on the strikers, didn't it, and actually evicted some of them from company-owned houses and from the hotel?

The cross-examination continued for ten additional pages of court record until the final statement by government counsel:

Q. And you understand, of course, do you not, Mr. Held, that the questions which I have directed to you along these lines have absolutely nothing to do with any charge in the indictment that you violated the law between 1962 and 1966?

United States v. Beno, 324 F.2d 582 (2d Cir. 1963), and did degrade them in the eyes of the jury, *United States v. Provoco*, 215 F.2d 531 (2d Cir. 1954).

Traditionally, this circuit has been most zealous in prohibiting the introduction of collateral matters in a criminal prosecution. In *United States v. Jacangelo*, 281 F.2d 574 (3 Cir. 1960), Judge Hastie declared that "admission of evidence of involvement in other crimes was intrinsically inadmissible as highly prejudicial information about a collateral matter not connected with the offense charged." In our recent case of *United States v. Shartner*, . . . F.2d . . . (3d Cir. No. 17,747, 1970), passing reference to the defendant's criminal record was held not to be reversible error solely because "it was not emphasized and was in a sense oblique." We said: "With this we are in accord albeit somewhat reluctantly. But the prosecuting attorney should not have been permitted to read that portion of the statement proving Shartner's prior conviction and the Trial Judge should have prevented such an occurrence. If it were not for the peculiar circumstances surrounding this incident we would hold it to be reversible error."

I believe that an improper cross-examination of at least one hour's duration, which persisted beyond an overnight recess, must be considered as more than an oblique reference—irrespective of the length of the trial.

Because I would remand for a new trial as to them, I would also hold that the Beckman charts supporting the oral testimony of Dr. Donald Beckman should be admitted, as well as Kohler Exhibit 132.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Judgment of Conviction.

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

No. 66-295 Criminal

UNITED STATES OF AMERICA
v.
KOHLER COMPANY

On this 12th day of August, 1969, came the attorney for the government and the defendant appeared in person, and by counsel Gilbert Helwig, Esq.

IT IS ADJUDGED that the defendant has been convicted upon his plea of Not Guilty and Verdict of Guilty of the offense of Engaging in unlawful combination and conspiracy in restraint of trade in violation of 15 USC 1 as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause the contrary being shown or appearing to the court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant pay a fine of $50,000.00 and a proportionate share of the costs which the Clerk of Court will determine.

IT IS FURTHER ORDERED that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

It Is Further Ordered that the clerk deliver two certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

LOUIS ROSENBERG,
United States District Judge.

JAMES H. WALLACE, JR.,
Clerk.

Judgment of Conviction.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18,183

UNITED STATES OF AMERICA
v.
AMERICAN RADIATOR & STANDARD SANITARY CORPORATION; KOHLER CO.; CRANE CO.; WALLACE-MURRAY CORPORATION; UNIVERSAL-RUNDLE CORPORATION; RHEEM MANUFACTURING COMPANY; BORG-WARNER CORPORATION; BRIGGS MANUFACTURING COMPANY; PLUMBING FIXTURE MANUFACTURERS ASSOCIATION; JOSEPH J. DECKER; DANIEL J. QUINN; NORMAN R. HELD; ROBERT E. CASNER; JOHN B. BALMER; STANLEY S. BACKNER; ROBERT J. PIERSON, JR.; and GEORGE W. KELCH
KOHLER COMPANY, Appellant

(D. C. Criminal No. 66-295)

On Appeal From the United States District Court for the Western District of Pennsylvania

PRESENT:
SEITZ and ALDISERT, *Circuit Judges* and HIGGINBOTHAM, *District Judge*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

Judgment of Conviction.

On consideration whereof, it is now here ordered and adjudged by the Court that the judgment of said District Court filed August 12, 1969 be, and the same is hereby affirmed.

ATTEST:
THOMAS F. QUINN
Clerk

September 23, 1970

APPELLANT KOHLER CO. RESPECTFULLY PRAYS THAT THE COURT GRANT A REHEARING IN THE ABOVE APPEAL AND, PURSUANT TO RULE 35(b), SUGGESTS THAT THE REHEARING BE *IN BANC*.

In support of this request, Kohler Co. submits that the Court has overlooked or misapprehended important points of law or fact in connection with the four holdings listed below, each of which is fundamental to the affirmance of Kohler's conviction:

I. THAT THE GOVERNMENT'S INFLAMMATORY CROSS-EXAMINATION OF NORMAN R. HELD ABOUT THE KOHLER STRIKE, WHILE ITS "POTENTIAL FOR PREJUDICE OUTWEIGHED ITS EVIDENTIARY VALUE", DID NOT CONSTITUTE PREJUDICIAL ERROR EVEN AS TO KOHLER AND HELD. (SEE OPINION OF COURT, PP. 20-23).

This holding (from which Judge Aldisert dissented insofar as it applied to Defendant Kohler and Held) rests upon a number of erroneous assumptions or premises:

A. The Court asserts that the line of cross-examination was invited ("the door was opened") by the efforts of Kohler and Held's attorneys "to create a picture of a completely beneficent employer." This discloses a misunderstanding or oversight on the part of the Court of the purpose of the testimony to which the Court alludes. The testimony referred to by the Court was not offered to show that Kohler was a "completely beneficent employer" but rather to show that Kohler's own economic well-being required that it maintain a high level of employment at its factory, and that this

tended circumstantially to establish that Kohler's interests would be harmed rather than served by any agreement which limited its capacity to compete for as large a share of the market as it could get. (See N.T. 3910-11; 3921; Appellants' Joint Reply Brief p. 14). If this opened the door to anything, it was to a showing that Kohler was not so situated or did not strive for such a level of employment. However, the Government made no effort to challenge Kohler's evidence in this way.

B. The view that counsel's opening statement to the jury "invited" the Government's offensive line of cross-examination also involved a misapprehension of the applicable rule of law. *United States v. Tomaiolo*, (2nd Cir. 1957) 249 F.2d 683 ("opening statement of counsel for defendant has no evidentiary value and therefore does not call for, or justify, cross-examination or rebuttal evidence" — headnote 6). See also *United States v. Provoo*, (2nd Cir. 1954) 215 F.2d 531.

C. While it concedes that the Government pursued the line of cross-examination beyond permissible limits, the Court ruled that because of the length of the trial and the relatively short amount of trial time which the offensive cross-examination required, *taken in conjunction with the strength of the Government's case against Defendants*, it "cannot find that this incident could have so affected the jury that a fair trial was denied Appellants." (Opinion of Court — p. 23). It is respectfully submitted that a balance of the amount of *time* spent in such examination is not an appropriate measure of the depth of the wounds which it inflicted upon all Appellants and especially Appellant Kohler. Further, the Court's reliance upon the strength of the

Government's evidence involves a failure to take into account the fact that the evidence on the issue of Held's acting within the scope and course of his employment for Kohler Co. (see Kohler Brief — pp. 19-28) was, at most, a close question. At least as to one basic element of the charge against Kohler, it is inappropriate to dismiss this error as non-prejudicial because of the strength of the Government's evidence.

Finally, the Court has applied the wrong test. For such error to be reversible error does not require that the Court find defendants *were* prejudiced; rather the conviction should be reversed unless the Court can say that they were *not*. *United States v. Pfizer & Co.* — CCH Trade Reg. Rep. ¶73,149 (2nd Cir. 1970). The Court did not make a finding that Appellants were *not* prejudiced. Even as to this, Judge Aldisert was satisfied that Kohler and Held were prejudiced and on this ground alone would have reversed their convictions. It is submitted that on this issue which divided Judges Seitz and Aldisert reargument is warranted.

II. THAT THE LOWER COURT'S EXCLUSION OF CERTAIN DOCUMENTARY EVIDENCE OFFERED BY KOHLER, EVEN WHERE ERRONEOUS, DID NO SUBSTANTIAL HARM.

A. Although satisfied that the lower court erred in limiting Kohler's economic evidence to the indictment period, this Court held that this ruling did not substantially harm the defense or preclude the use of any of the so-called "Beckman Charts." (Opinion of Court — pp. 34-36). This holding reflects a misapprehension of the prejudicial effects of the lower court's ruling. (See, the discussion of prejudicial in Appellants' Joint Brief — pp. 83-91).

While the trial court would have permitted Dr. Beckman's 107 charts to be used if modified to eliminate the pre-and post-indictment years, it was manifestly impracticable during the trial to change any more than the twelve exhibits which were modified and offered. These few could not possibly serve the purpose of the many discarded exhibits even though, as this Court states, the twelve "strongly support Dr. Beckman's analysis of the indictment period."

Appellants agree with this Court that Dr. Beckman's "distinguished credentials" (J.A. 595a-596a) and his "forceful and direct" testimony even when supported only by these few truncated charts, should have sufficiently impressed the jury. Indeed, standing alone we believe they would have, but they went to the jury beclouded by an erroneous ruling made in this highly prejudicial context: After little more than a morning of direct examination, devoted largely to outlining the nature of his economic studies (T. 8570-8673), Dr. Beckman was subjected to a prolonged, denegrating voir dire which was actually a premature cross-examination (T. 8673-8834; T. 8735 et seq. at J.A. 1500a-1515a, inclusive). This was followed by Government counsel's formal objection to Kohler Exhibits 221 through 227, and a limiting ruling which became precedent for the remaining exhibits. The Government's objection that the pre-and post-indictment years were irrelevant and immaterial was accompanied by the accusation that the charts as offered were "misleading and deceptive", and were based on "loaded or biased sampling." (J.A. 1512a-1514a).

Although the trial court ruled adversely to the Appellants only by limiting the time period of the

charts, the judge said in the jury's hearing that the Government's other contentions went to "the weight and credibility of this evidence" (J.A. 1514a).[1]

If the judge had simply overruled the Government's objection, as this Court agrees he should have, Dr. Beckman's 107 exhibits could have gone to the jury just as he had prepared them, impressively buttressing his oral testimony. Instead, the exhibits bearing their emasculating patches were a constant suggestion to the jury that Dr. Beckman had prepared them incorrectly—that he had tried to get away with something improper and the judge had prevented it. Thus, the lower court's erroneous ruling effectively interfered with the jury's being impressed by Dr. Beckman's "forceful and direct testimony" and his "distinguished credentials as an economic expert."

B. The Court ruled that the exclusion of the American Standard Field Reports (Exhibits 60-104) was proper because the records were not properly authenticated as business records. (Opinion — pp. 36-37). It is respectfully submitted that the Court erred in failing to follow the rule of the *Continental Baking* case (see Appellants' Joint Brief pp. 100-104); but apart from this, we believe that the ruling misapprehends the holding of the *Moore* case upon which the Court relies.

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1. Other instances of comments by the Court which tended to impair Dr. Beckman's credibility with the jury or to influence a belief that the economic evidence had little probative value may be found at J.A. 704a-709a and 743a-744a, inclusive.

Moore and *Continental Baking* are reconcilable on the ground stated in the latter at page 148:

> "The ruling in Moore was predicated on the fact that there was no showing that the firms involved had a regular procedure by which the documents were transmitted. Here, Continental had an established policy, and private mailing system, for the reporting by depot managers on competitors in the field."

We agree with this Court that the "trustworthiness of the documents is the touchstone * * *," but trustworthiness must be related to the purpose of the offer. In the instant case it is not contended that *each* of the exhibits, standing alone, evidenced the precise truth of every statement contained in it. Thus, we do not have the *Hoffman* situation.

These reports, in the aggregate, in view of the circumstances under which and the purposes for which the reports were made, trustworthily depicted the overall competitive situation. The reports were required by American Standard; they were made regularly, and in the aggregate they were relied upon by American Standard in setting and quoting prices.

C. The Court suggests that the exclusion of Kohler Exhibit 132, a summary made from Kohler business records which were present in court, was within the discretion of the trial court (although this Court may have ruled differently) because of *the form in which it was offered*. The Court has been confused by the Government's argument that the title of the exhibit was misleading. Thus, the Opinion says that the 600-odd examples listed in the exhibit were substantially all of the

quotations above the allegedly agreed upon maximums. (Opinion — p. 37). The record is to the contrary.

The "allegedly agreed upon maximums" were 15% on enameled iron and 20% on china. Mr. Haack testified that Exhibit 132 included only special discounts of more than 20%. (J.B. 106; J.A. 1443a). The contents of the exhibit itself fully support this. This exhibit not only omitted *all* below the alleged limitations of 15% on iron and 20% on china, but also *on* enameled iron quotations between 15% and 20%. These were omitted because they would be equivocal, since only impressively numerous discounts beyond the alleged limits would have any probative value. Had all quotations above the "allegedly agreed upon maximum percentages" been included, as this Court stated, the exhibit would have been much longer. The portion of Kohler business involving job pricing with discounts of more than 15% on enameled iron and 20% on vitreous china would be in excess of 50% of the total. (J.A. 1455a, 1456a).

Another reason why the title of the exhibit is not in fact misleading is that it is a study of only certain types of jobs, whereas discounting occurred in other categories of competitive quotations not covered by the study. Tract housing, accounting for about 25% of Kohler's entire production, was one large area of special discounts omitted from Kohler Exhibit 132 for this reason. (J.B. 107, n. 68; J.A. 1438a, 1446a).

Thus, Kohler Exhibit 132 is, as its title correctly states, "SOME EXAMPLES OF COMPETITIVE QUOTATIONS — 1963". The omission of tract housing and all other areas of competitive quoting except specific jobs, and the omission of all jobs where the discounts

were 20% or less, would make any other title erroneous. This misapprehension by the Court may have affected its reaction to the lower court's ruling in excluding the exhibit.

This Court dismissed the question of prejudice to Appellants on the ground that "extensive defense testimony concerning the existence of these discounts" made the jury largely "aware of the Appellants' proof of this point even without the exhibit."

But Appellants are entitled to more than "awareness" by the jury; they are entitled to whatever credibility, relevant, corroborative evidence will afford. This they were denied. On the other hand, the Government's exhibits (GX 401-421, inclusive) showing only *published, not actual*, prices went to the jury intact as circumstantial, corroborative, evidence of collusion.

It is respectfully submitted that Appellants were prejudiced as stated in their Joint Brief, pp. 112-116, inclusive. Their oral testimony concerning competitive discounts went to the jury clouded by the trial court's deprecating comments on this exhibit and argument (J.A. 1451a) but without benefit of a strong corroborating exhibit.

D. Although conceding its exclusion was error, the Court held that Defendants were not substantially prejudiced by the exclusion of the Commerce Department letter. (Opinion—page 38). This holding reveals misunderstanding by the Court of the purpose for which the letter was offered and the significant probative force which the matters it revealed would have in supporting the honesty and credibility of Defendants' witnesses. The letter would not merely have

shown that in October 1962 the Commerce Department "believed regular enamel products were standard to the industry." It would have exploded the Government's arguments that Defendants' witnesses had fraudulently concealed this fact from the Government as part of their conspiracy to put over the commercial standard charge. (See—Joint Brief—pp. 116-118).

III. THAT THE QUESTION OF KOHLER'S VICARIOUS RESPONSIBILITY FOR THE ACTS OF ITS EMPLOYEES WAS FAIRLY SUBMITTED TO THE JURY.

The Court rejected Kohler's contention that the issue of its vicarious responsibility was not fairly presented to the jury holding that the defense evidence which was excluded was "of marginal relevance and substantially cumulative" and that the instruction given by the Court on the issue was substantially accurate. The Court further asserted that Kohler failed to comply with the requirements of F.R.Cr.P. 30 and was therefore not in a position to complain about this aspect of the charge.

The assertion that the excluded evidence was of marginal relevance discloses a misapprehension of the facts involved. (See Kohler's Separate Brief pp. 24-25). It may be significant that the agency issue is the only issue not discussed by the Court in its extensive evaluation of the "compelling force" of the Government's evidence. (See Opinion pp. 6-18). Yet this issue is concededly one of the necessary elements of the charge against Kohler and as much as any other element of the crime charged, must be proved beyond a reasonable doubt. If it is close, the entire case against Kohler is close and it may have been harmed seriously by the exclusion of any relevant evidence.

It is further respectfully submitted that a reading of the excerpt from the lower court's charge which is cited in the Opinion of Court (pp. 50-51) proves the inadequacy of the charge on this issue, rather than the contrary.

This Court says that the charge "in substance" (Emphasis supplied) In the quoted portions of the agent "acted on behalf of the corporation *and* within the scope of his employment or apparent authority." was that the corporation would be responsible if the charge of the lower court, however, the instruction is:

> "A corporation is legally bound by the acts or statements of its agents done or made within the scope of their employment *or* their apparent authority."
>
> and
>
> "When the act of the agent is within the scope of his employment *or* his apparent authority, the corporation is held legally responsible for it . . ." (Emphasis supplied)

The statement that Kohler's counsel did not comply with the requirement of F.R.Cr.P. 30 ignores the fact that Kohler submitted a detailed request for instruction on this issue to the court, which the court declined to give. (See Defendant's Proposed Points for Charge No. 48, document No. 316).

Rejecting Kohler's complaint that the jury was not instructed that it must be satisfied beyond a reasonable doubt on the issue of Held's authority, the court reasoned that the jury must have understood this because at the beginning of his charge the trial judge made it clear that a defendant can be found guilty only if the jury weighs beyond a reasonable doubt "as to every

essential element of the crime." The trouble with this reasoning is that nowhere did the court tell the jury that proof of agency and employment was such an essential element of the crime.

The submission of a specific request for such a charge (Requested Instruction No. 49) and its rejection by the lower court made it inappropriate to evoke F.R.Cr.P. 30 as a basis for disregarding this error. Beyond this, this issue was so basic that it was a fundamental error for the court seriously to inhibit Kohler's defense by erroneously rejecting evidence bearing on the issue and by giving only a prefunctory instruction concerning the issue. (See Kohler's Separate Brief—pp. 19-28.)

IV. That as to all Appellants Except Decker "The Cumulative Effect of the Government's Case Was Overwhelming." (Opinion—p. 55)

This statement, insofar as it encompasses the Defendant Kohler Co., can be explained only by assuming that this Court, like the court below in its rulings on evidence and its charge, (and, probably, like the jury) has simply overlooked the fact that a basic element of the crime charged to Kohler was the issue of Kohler's responsibility for Held's acts. In its discussion of the evidence on this issue, the Court does not suggest that the evidence against Kohler is "overwhelming", but merely that it was sufficient to take the case to the jury. (Opinion—p. 49: "We think the jury could have found that Held's illegal actions were within the scope of his authority.")

And even here, the Court misapprehends the law by considering as evidence against Kohler Co. Calla-

nan's testimony that "at one of the conspiratorial meetings Held claimed 'that he was speaking for his Company.'" The Court here disregards the well-established rule that hearsay statements of an agent concerning his authority are not evidence against the principal either of the existence or the extent of authority. Restatement, Agency 2d, §285; *United States v. Bensinger Co.*, 1970 Trade Reg. Rep. ¶73,260 (June 1970, 8th Cir.).

CONCLUSION

For the reasons stated above, it is respectfully requested that the Court grant a rehearing in this appeal.

Respectfully submitted,

GILBERT J. HELWIG
REED SMITH SHAW & MCCLAY
Attorneys for Kohler Co.

Order Denying Rehearing

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18,183 (Appeal of Kohler Co.)

UNITED STATES OF AMERICA

vs.

AMERICAN RADIATOR & STANDARD SANITARY CORPORATION, et al.

(D. C. Criminal No. 60-295)

Our Petition for Rehearing

PRESENT:

HASTIE, *Chief Judge*, and SMITH, ALDISERT, GANEY, *Circuit Judges*, and HANNUM, *District Judge*.

The petitions for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT
COLLINS J. SEITZ
Circuit Judge

Dated: November 3, 1970

Defendants' Requests for Charge.

Defendants' Request for Charge

* * *

No. 48

If the acts of an employee or other agent are voluntarily and intentionally ordered or directed, or authorized or consented to by a person, then the law holds that person responsible for such acts, just as if the acts had in fact been done personally by such person.

A corporation is, in law, a person, but it cannot act except through its directors, or officers, or employees, or other agents. A corporation, of course, is not to be held criminally liable for every illegal act of one of its directors, officers, employees, or agents.

However, the law does fasten criminal liability upon a corporation for an unlawful act done by a director, officer, employee, or other agent, within the scope of his authority. The individual's authority is to be measured by the surrounding facts and circumstances, including the ordinary course of the individual's employment, any oral or written instructions and policies laid down for him by his superiors, and the behavior and practices of his superiors and associates in similar matters.

In determining whether an individual had authority from a corporation to do an illegal act, if any individual is found to have committed an illegal act, the jury is to consider whether his act was ordered or consented to or approved by his superiors whether his act was consistent with or in violation of his standing orders concerning how he should carry out his job.

whether he failed to keep his superiors informed of his activities, and whether his act was typical or representative of the acts of his superiors and associates.

* * *

No. 49

Kohler Co. has submitted evidence that Norman Held did not have authority to establish published prices for Kohler plumbing fixtures and so did not have authority to enter into any agreement with Kohler's competitors concerning such prices.

Even if there were evidence sufficient to satisfy you that Norman Held had made an illegal agreement with a representative of a competitor, you must acquit Kohler unless under all the evidence you are satisfied beyond a reasonable doubt that his conduct was authorized by Kohler or thereafter became known to Kohler and was ratified by it. The existence of such authority is an element of the crime herein charged against Kohler, and, like every other element of the crime, the existence of authority, or in its absence, of such ratification must be proved to your satisfaction beyond a reasonable doubt.

* * *

Court's Charge to the Jury

* * *

[10,199] Since some of the defendants in this case are [10,200] corporations, I deem it proper to instruct you concerning this.

In order that we may advance our economy with convenience and usefulness, the law has provided for corporations. These are instrumentalities which stand within certain limits in the eyes of the law as legal entities similar to persons, and as such are given legal attributes similar to those possessed by persons — and in law, they are considered as acting as persons.

A corporation, although an artificial being, existing only in contemplation of law, is held to the same measure of liability as an individual and is entitled to the same rights or protection. A corporation acts through its officers, directors and agents and, as such, may conspire with other corporations or with other individuals, as well as individuals may conspire with one another, they may conspire with any other corporation.

A corporation, itself, cannot attend a meeting or make decisions; it must act through agents, such as its officers, directors and employees. In order for a corporation to be responsible for the acts or statements of one of its agents it is not necessary that the corporation specifically authorize the agent to commit the act or to make the statement. A corporation is legally bound by the acts and statements of its agents done or made within the scope of their employment [10,201] or their apparent authority. Acts within the scope of employment are acts done on behalf of a corporation and directly related to the performance of the type of duties the employee has general authority to perform. Appar-

ent authority is the authority which outsiders could reasonably assume that the agent would have, judging from his position with the company, the responsibilities previously entrusted to him, and the circumstances surrounding his past conduct.

When the act of the agent is within the scope of his employment or his apparent authority, the corporation is held legally responsible for it, although what he did may be contrary to his actual instructions and may be unlawful.

If you conclude that an agent of a defendant corporation, acting on behalf of the corporation and within the scope of his employment or his apparent authority, engaged in a price-fixing conspiracy, then it is no defense that the corporation had instructed its employees orally or in writing to comply with the antitrust laws and no to engage in price discussions with competitors.

If you find that there was an illegal conspiracy and that a defendant corporation learned of it by having a representative present at a conspiratorial gathering or meeting, then you must consider whether later actions taken by that corporation, such as publishing particular prices or announcing the discontinuance of a [10,202] product, lead you to conclude that such corporation was knowingly adhering to the conspiracy. In other words, later actions taken by a corporation whose employee attended a conspiratorial meeting may be considered as circumstantial evidence that it had knowledge of the conspiracy and that it intends to ratify or adhere to the conspiracy, and thus become a member of it.

Since three defendants in this case are corporations, this case should be considered and decided by you on the basis that a corporation, large or small, is

entitled to the same fair trial at your hands as a private individual. The law is no respecter of persons, whether rich or poor, old or young, or whether local residents or non-residents. All persons, including corporations, stand equal before the law, and are to be dealt with as equals in a court of justice.

* * *

Exceptions to the Court's Charge

* * *

[10,236] Mr. Helwig: Your Honor, the other point, [10,237] second point, which I wish to discuss in the charge of the Court with respect to the element of the authority of an actor or employee to so act as to impose criminal liability upon a corporation.

The Court: You mean, within his apparent scope of authority?

Mr. Helwig: I have two basic objections to that aspect of the Court's charge, though I recognize the language your Honor used in to be found in cases.

The Court: That is where I got them.

Mr. Helwig: The first objection I have is probably one that must be addressed, if at all, to some other court, but I do not feel the doctrine of apparent authority is appropriate in a criminal case. But the second aspect of my point is, your Honor, that in determining when the requisite authority exists, however it should be labeled, I would feel that the criteria or standards which were spelled out in our request number 48 apply.

The Court: Well, now, there you go again in referring me to the forest.

Mr. Helwig: But which are set forth in the following two paragraphs if I may read them:

Exceptions to the Court's Charge.

"The law does fasten criminal liability upon a corporation for an unlawful act done by a director, officer or employee or other agent within the scope of the [10,250] authority. The individual's authority is to be measured by the surrounding facts and circumstances, including the ordinary course of the individual's employment, any oral or written instructions and policies laid down for him by his superiors and the behavior and practice of his superiors and associates in similar matters. In determining whether an individual had authority from a corporation to do an illegal act, if any individual is found to have committed an illegal act, the jury is to consider whether his act was ordered or committed to or approved by his superior, whether his act was consistent with or any violation of his standing orders concerning how he should carry out his job. Whether he failed to keep his superiors informed of his activity or whether his act was typical or representative of the acts of his superiors and associates."

The Court: I think I have given them enough, Mr. Helwig, in accordance with the law and I don't think that really reflects the law completely. While some of it may have some legal foundation we are dealing with a criminal case now as distinguished from a civil case where the acts of an agent of a corporation is in question. It's a little different from where the criminal act of the corporation is involved as it relates to the agent's obvious apparent or likely authority based upon those acts.

Now, to give them anything further than that [10,259] I don't think it is required. I am sorry to tell you that, but that is the way I feel.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1047

AMERICAN RADIATOR & STANDARD SANITARY CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 1048

BORG-WARNER CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1049

NORMAN R. HELD, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1050

KOHLER CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-72a [1]) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1970, and petitions for rehearing were denied on November 3, 1970. The petitions for writs of certiorari were filed on December 3, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in affirming jury verdicts convicting petitioners of participation in an antitrust price-fixing conspiracy, the court of appeals applied the proper standard of appellate review.

2. Whether petitioners' right of confrontation under the Sixth Amendment was violated by application of the federal co-conspirator exception, and other well-recognized exceptions, to the hearsay rule.

3. Whether the court of appeals correctly held that cross-examination of petitioner Heid concerning the

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[1] The court's opinion appears identically at pages 1a-72a in the appendices of the petitions in Nos. 1048, 1049, 1050. It also appears at Pet. App. No. 1047, 7a-78a. For convenience, the United States will use the text of the opinion set forth in Nos. 1048, 1049 and 1050 and refer to this simply as "Pet. App."

As used herein "J.A." refers to the four-volume Joint Appendix to the main briefs in the court of appeals. "E" refers to the three-volume "Exhibits to Joint Appendix"; "T" refers to the trial transcript.

1954 strike against Kohler Company did not constitute prejudicial error as to Held and Kohler, when considered in the context of the entire trial, and the strength of the government's case.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment of the Constitution provides:

> * * * nor shall any person * * * be deprived of life, liberty, or property, without due process of law; * * *

The Sixth Amendment to the Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him; * * *.

Section 1 of the Sherman Act, 15 U.S.C. 1, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States * * * is declared to be illegal: * * * Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1–7 of the title to be illegal shall be deemed guilty of a misdemeanor * * *.

STATEMENT

On October 6, 1966, a grand jury returned a single count indictment charging eight corporations, eight high-ranking employees of those corporations and a trade association with conspiring to fix the prices of enameled cast iron and vitreous china plumbing fixtures, in violation of Section 1 of the Sherman Act

(Pet. App. 2a–3a).[2] The indictment stated that at meetings held in several cities the defendants agreed to raise prices on enameled cast iron and vitreous china plumbing fixtures, to limit the maximum allowable discounts on those fixtures, and to discontinue the production of regular enameled cast iron fixtures, leaving production only of higher-priced acid resistant fixtures; and that the defendants had carried out their agreement (Pet. App. 2a–4a).

Eleven of the seventeen defendants pleaded *nolo contendere* and were sentenced on their pleas (Pet. App. 5a). The petitioners chose to stand trial. After a sixteen-week jury trial, all six petitioners were convicted (Pet. App. 5a–6a). The court of appeals affirmed (Pet. App. 66a).[3]

The conspiracy consisted of four phases, interrelated as to timing and participants, yet possessing sufficient distinctiveness to merit separate discussion.

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[2] The defendants other than the petitioners were Crane Company and its vice-president, Robert Casner; Universal-Rundle Corp. and its vice-president, Stanley Backner; Rheem Manufacturing Co. and its vice-president, Robert Pierson; Wallace-Murray Corp. and its president, John Balmer; Briggs Manufacturing Company; George Kelch, President of petitioner Borg-Warner's Ingersoll-Humphryes Division; and the Plumbing Fixtures Manufacturers Association (PFMA) (Pet. App. 2a–3a).

[3] The affirmance was unanimous as to petitioners American Standard, Borg-Warner, Decker, and Quinn. Judge Aldisert dissented from the affirmance of the convictions of Kohler Company and Held. All the affirmances were as to all aspects of the conspiracy except for petitioner Decker; as to him, the court of appeals affirmed on a finding of sufficient evidence regarding the conspiracy to eliminate regular enameled fixtures, and did not decide the sufficiency question regarding other aspects of the conspiracy.

A. THE AGREEMENT TO INCREASE BATHTUB PRICES

In October and November, 1962, the seven defendant corporations producing enameled cast iron plumbing fixtures all published identical, increased prices on high volume enameled cast iron bathtubs (Pet. App. 8a).[4] This uniform price increase was the direct result of an agreement reached by the sales officials of the corporations in a meeting held on September 17, 1962, at petitioner Quinn's room at the Sheraton-Chicago Hotel (Pet. App. 8a). Petitioners Quinn and Held were there, as was defendant Kelch of Borg-Warner; high-ranking officials of Crane, Universal-Rundle, Rheem and Wallace-Murray also participated (Pet. App. 8a–9a). As the court of appeals noted, "[t]here was substantial 'eyewitness' testimony concerning price discussions and agreements at this gathering" (Pet. App. 9a).

For example, Mr. Callanan, who had participated in the meeting for Rheem, testified not only that there had been a discussion of specific bathtub prices, but also that there had been agreement as to what the new prices would be.[5] Similarly, Mr. Cannon of Wallace-

[4] All seven corporations published new special prices, which quoted prices applicable to purchases of high-volume staple items in accord with certain specified conditions. The bathtubs involved in this phase of the conspiracy were such items. (Pet. App. 8a).

[5] "Q. The question, Mr. Callanan, was: What was decided with respect to the specific increased prices on bathtubs in that room?

"The COURT: If anything.

"THE WITNESS: The prices as reflected in my bulletin of November 2, 1962 [which were identical to the prices of all the other manufacturers], were the prices that I came out of that room with that understanding." (Pet. App. 9a).

Murray reported to his superior of the Sheraton-Chicago agreement that there had been a discussion of prices and "* * * that there was a tentative agreement to increase prices * * *." (Pet. App. 10a).

B. THE AGREEMENT TO MAINTAIN AND INCREASE THE PRICES OF VITREOUS CHINA PLUMBING FIXTURES

The conspirators who met in petitioner Quinn's hotel room on September 17, 1962, were not only concerned with raising bathtub prices; they also wanted to put into effect a general increase in the prices of vitreous china fixtures. They agreed that higher prices were a necessity, but they feared that an increase at that time would not hold if the "short-line" manufacturers[4] kept their prices at current levels (Pet. App. 11a–12a). However, on November 20, 1962, petitioners Quinn and Held, along with Kelch of Borg-Warner and high-ranking officials of Crane and Rheem, met at the Shoreham Hotel in Washington (Pet. App. 12a). Rheem's vice-president, Pierson, testified that Casner of Crane announced that Crane would soon raise prices to a specific level. Discussion of these prices followed and, according to Pierson, "It was my opinion when I left that people probably would follow the lead of Crane in some form or another" (Pet. App. 13a).

Crane did announce a 7 percent across-the-board in-

[4] In the trade, a "short-line" manufacturer is one that produces only the most commonly used vitreous china fixtures. Petitioners American Standard, Kohler and Borg-Warner (and all the other indicted corporations except Briggs) were "full-line" companies.

crease on all china fixtures on January 14, 1963. Shortly thereafter all the indicted corporations except Borg-Warner raised their prices to the level of Crane's (Pet. App. 13a).[1] The conspirators, fearing that this increase would not hold firm, met at the Waldorf-Astoria Hotel in New York on February 7, 1963, "* * * to try to maintain the new prices" (Pet. App. 13a). Petitioners Decker, Quinn, and Held were present, as were Kelch of Borg-Warner and several other high-ranking sales officials (Pet. App. 13a–14a). Bonnett of Wallace-Murray testified that the men discussed new china prices and that petitioner Quinn stated that "* * * the general consensus was that the new prices would—we would try to maintain the new prices" (Pet. App. 14a). Five days later, Borg-Warner raised its prices to conform with those of the other conspirators.

C. THE AGREEMENT TO LIMIT MAXIMUM DISCOUNTS FROM WHOLESALER NET PRICES

The conspirators further agreed that they each would limit the discounts from wholesaler net prices to a maximum of 15 percent for enameled cast iron and 20 percent for vitreous china fixtures (Pet. App. 15a). Once again, agreement was reached at the September 17, 1962, meeting at Quinn's Chicago-Sheraton

---

[1] Briggs had had no representative at the Shoreham Hotel meeting, but it increased its prices only after its vice-president, Betz, had discussed the price increase with Crane officials and agreed to raise its prices to the agreed levels. (Pet. App. 13a).

hotel room. Once again, the proof of agreement came from eyewitness testimony. Callanan of Rheem testified that he came away from the meeting "of the opinion that other people would be using the same structure" (Pet. App. 16a). The "other people" were the "other members who were in the room that evening," and the "structure" was "[f]ifteen per cent on iron and twenty per cent on china" (Pet. App. 16a). Cannon of Wallace-Murray confirmed these percentages in his testimony; he noted that in the discussion he had agreed to verify actual prices quoted from his competitors, in order to prevent building contractors from playing off one manufacturer against another and getting a better discount than the 15 percent and 20 percent allowed (J.A. 27a; 292a–294a). When the conspirators met on February 7, 1963, at the Waldorf-Astoria Hotel, they reaffirmed their earlier agreement to limit discounts. Bonnett of Wallace-Murray testified that petitioner Quinn reported to him that there had been a discussion of discounts and a "tentative discussion or agreement" to limit the discounts to 15 percent on cast iron and 20 percent on vitreous china (Pet. App. 16a–17a). Bonnett assured Quinn that his company "would try to adhere to those discounts" (Pet. App. 17a).[8]

[8] Bonnett, upon returning to Pittsburgh, instructed his subordinate Cannon not to discount from wholesaler net prices more than those percentages on those products (J.A. 305a–306a).

D. THE AGREEMENT TO ELIMINATE REGULAR ENAMELED CAST IRON PLUMBING FIXTURES AND TO INCREASE THE PRICES OF ACID RESISTANT FIXTURES

Another aspect of the conspiracy was the agreement to stop production of regular enameled cast iron fixtures and impose an increased price structure on the acid resistant fixtures which would remain in production. Regular enameled cast iron fixtures were important to the conspirators' business. They accounted, for example, for more than $20,000,000 in gross annual sales at American Standard (Pet. App. 17a). Competition from steel and plastic fixtures, both of which are acid-resistant, was intense (Pet. App. 17a). In order to implement an industry decision to discontinue so fundamental a line of fixtures, however, strong protective cover was needed (JA 507a, 479a–482a). The device selected was to change the Enameled Cast Iron Plumbing Fixtures Commercial Standard by having it provide for acid-resistant finish only, and then cite the revision to justify discontinuation of regular enamel. Publication of the revised standard would also serve as the signal for the defendants' scheme to become operational (JA 470a–472a, 403a, 405a, 418a; 394a–395a).*

The conspirators agreed upon the elimination of regular cast iron and the new prices for acid resistant cast iron at a meeting on March 28, 1963, in Quinn's

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*The Commercial Standard is a recorded voluntary standard of the trade published by the U.S. Department of Commerce (E 158). Since the standard is purely voluntary, it could not require the conspirators to discontinue the use of regular enameled cast iron fixtures.

room at the Palm Beach Biltmore Hotel (Pet. App. 18a)." Pierson of Rheem testified that petitioners Quinn, Decker and Held were present, as were Kelch of Borg-Warner and several other key officials of other corporations (Pet. App. 18a). Pierson testified most explicitly of this meeting:

> A. The discussion resolved [sic] around the specific timetable that would occur in this change from—in the elimination of regular enamel and the pricing schedule that would resolve as a result of this change.
>
> Q. Were specific prices mentioned during the course of this meeting?
>
> A. Yes.
>
> * * * * *
>
> Q. What was decided at this meeting, if anything, Mr. Pierson?
>
> A. Well, as I said originally, there was a timetable established *and a new pricing structure, which I felt was agreed by all those present.* [Pet. App. 18a–19a; emphasis added by court of appeals.]

As the court of appeals found, Cannon of Wallace-Murray confirmed Pierson, testifying that the participants had discussed the "proper philosophy" of pricing in the new all acid-resistant market and that they had decided upon certain prices (Pet. App.

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[10] The record shows that the conspirators had frequently discussed the need to eliminate regular enamel and to restructure the prices of acid-resistant enamel before: at the Sheraton-Chicago meeting in September, 1962 (JA 371a, 554a–555a, 477a–478a); at meetings at the Shoreham Hotel in November, 1962 (JA 435a–436a, 442a–444a, 458a–459a; E4); at the Americana Hotel in New York (JA 376a–377a).

19a). Callanan also confirmed the price discussion and the specificity of the prices selected (Pet. App. 19a). He also testified that "There was a general discussion that the timing of the thing would tie in with the issuance of Commercial Standards" (JA 368a–369a)."

In order to reaffirm their Palm Beach agreement, the conspirators met two months later at the Airport Hotel in Pittsburgh on May 15, 1963 (Pet. App. 20a). Decket, Quinn, and Held were present, as were Kelch of Borg-Warner and officials of Crane, Wallace-Murray, Rheem, and Universal-Rundle (Pet. App. 20a). Bonnett of Wallace-Murray testified that they discussed specific prices and that "It was my understanding when I left the meeting that the prices would generally be on this level" (Pet. App. 20a). The somewhat general nature of the discussion was due to the fact that this meeting was to reaffirm the decision taken earlier at Palm Beach. As Cannon of Wallace-Murray testified, at the time of the Pittsburgh meeting he already knew the price structure to be announced in July and August of that year (JA 403a).

The conspirators held a final, confirmatory meeting in Quinn's room at the Waldorf-Astoria Hotel on

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[11] The purported justification for removing non-acid-resistant enamel from the Commercial Standard was that it was no longer an industry-wide item. The PFMA Enameled Cast Iron Standards Committee so stated on February 7, 1963 (E328 ¶ 5). As the defendants themselves admitted at trial (JA 553a–554a, 556a, 478a, 516a, 391a–392a), this representation was untrue. In turn, the Commerce Department on June 7, 1963, issued a new, revised standard (effective July 10, 1963) that "for the first time made acid resistant cast iron enamel fixtures the industry standard" (Pet. App. 17a–18a).

June 26, 1963 (Pet. App. 20a). In the words of Pierson, who attended, there was "a general review of the proposed plan on this product line and the pricing that was related thereto" (Pet. App. 20a). A copy of the announcement that American Standard intended to issue concerning the changeover and the new prices was discussed by the group (Pet. App. 20a–21a). On July 1, 1963, American Standard made this announcement public: within two months all the other indicted cast iron manufacturers had announced their discontinuance of regular enameled cast iron fixtures and new, higher prices for acid resistant fixtures (Pet. App. 18a).

The court of appeals stated: "The government's evidence of price fixing by the appellants was compelling * * * the cumulative effect of the government's case was overwhelming" (Pet. App. 65a–66a). As the court noted, the government's case largely relied on the consistently incriminating eyewitness testimony of the petitioners' own co-conspirators (Pet. App. 66a), and showed an extensive and successful conspiracy to fix prices on enameled cast iron and vitreous china plumbing fixtures.

ARGUMENT

I. THE COURT OF APPEALS APPLIED THE APPROPRIATE STANDARD OF REVIEW

In many respects this is a typical antitrust criminal conspiracy case: there are several defendants, the trial consumed sixteen weeks, and the record of trial runs to more than 10,000 transcript pages and 900 exhibits.

In at least one respect, however, this case is decidedly atypical. Here, the government's proof rested not primarily on inferences to be drawn from circumstantial evidence of parallel business behavior but on direct testimony of witnesses who were themselves participants in illegal price discussions and agreements. The appropriate standard for appellate review in this type of case was long ago established by this Court: where the evidence against the defendants is strong, jury verdicts will not be reversed for errors unless the reviewing court is persuaded that misconduct of the trial prevented the jury from determining the case on a dispassionate consideration of the evidence. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239–240. See also *Glasser* v. *United States*, 315 U.S. 60, 83.

The court of appeals correctly applied this standard in discharging its difficult review function here. To be sure, it found and identified errors; total absence of error in a lengthy and hard-fought trial of this magnitude and complexity would be surprising indeed. But after a painstaking review of the entire record, and thorough consideration of all the many issues raised by petitioners here, the court concluded that:

> Whether the errors be viewed in isolation or cumulatively we are completely satisfied that they did not deprive appellants of a fair trial or operate to their substantial prejudice. On the contrary, we are satisfied from our examination of the record in its totality that the appellants received a fair trial and that their conviction

was entirely warranted from the evidence. [Pet. App. 66a]."

This conclusion was in full conformity with the court's duty under the federal harmless error statute.[11] It is true that the court spoke of the strength of the government's case; indeed the court found the government's proof "overwhelming" (Pet. App. 65a). But the court made plain that it had viewed "the record in its totality"; under the doctrine of harmless error an appraisal of the strength of the government's case is essential. Even error of constitutional scope—and there was no such error in this case—may be harmless in the face of overwhelming government proof. *Harrington* v. *California*, 395 U.S. 250, 254. *A fortiori*, overwhelming government proof may render ordinary error harmless.

We submit that petitioners had a full and fair trial, and that the claims they seek to present here were fully considered and correctly rejected by the court below under the appropriate standard of review.

II. THERE WAS NO VIOLATION OF THE PETITIONERS' SIXTH AMENDMENT RIGHT TO CONFRONTATION

A. Petitioners request this Court to declare the co-conspirator hearsay exception a denial of the right of

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[11] Except as to petitioners Kohler Co. and Held, and with reference to only a single issue to be discussed *infra*, this determination was unanimous.

[12] 28 U.S.C. 2111: "On the hearing of any appeal • • • the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

confrontation (Pet. No. 1047, 15–16). The co-conspirator exception to the hearsay rule has been part of federal law for well over a century. *United States* v. *Gooding*, 12 Wheat. 460. As the court of appeals observed, this Court has held it not to be a violation of the Sixth Amendment. *Lutwak* v. *United States*, 344 U.S. 604. See, also, *Clune* v. *United States*, 159 U.S. 590; *Delaney* v. *United States*, 263 U.S. 586.

Petitioners do not dispute this precedent, but they claim that the co-conspirator hearsay exception is "in conflict with the rationales" of *Bruton* v. *United States*, 391 U.S. 123, and *Evans* v. *Dutton*, 400 F. 2d 826 (C.A. 5) (Pet. No. 1047, 15). But *Bruton* expressly did not involve the co-conspirator exception to the hearsay rule, 391 U.S. 123, 128, n. 3, and this Court, since the instant petitions were filed, has reversed the Fifth Circuit's decision in *Dutton* v. *Evans*, 400 U.S. 74.

In *Dutton* v. *Evans*, *supra*, the Court held that Georgia's co-conspirator exception to the hearsay rule was not a violation of appellee's right of confrontation under the Sixth and Fourteenth Amendments. While the validity of the federal evidentiary rule was not in issue, 400 U.S. at 82, the federal rule is considerably more restrictive of co-conspirator hearsay than the Georgia rule whose application to Evans was held constitutional.

Moreover, looking to the impact of the co-conspirator hearsay admitted in this case, one is struck by its insignificance. The court of appeals, after a thorough

examination,[14] concluded that the instances in which declarations of a co-conspirator who did not testify were received "amounted at best to a handful * * *. The sum of its weight was extremely small and insignificant when the record is considered as a whole" (Pet. App. 38a). Any confrontation issue in this case is raised in a context of harmless error beyond a doubt. See *Dutton* v. *Evans, supra; Harrington* v. *California, supra; Lutwak, supra.*

B. There is no merit to the contention (Pet. No. 1047, 16–17) that the decision of the court below conflicts with decisions of the Sixth and Ninth Circuits. In both *Townsend* v. *Henderson,* 405 F. 2d 324 (C.A. 6) and *O'Neil* v. *Nelson,* 422 F. 2d 319 (C.A. 9), certiorari granted, No. 336, O.T. 1970, November 9, 1970, confessions of one co-defendant, made while in police custody[15] and incriminating to another co-defendant, were received in violation of the rule of *Bruton* v. *United States,* 391 U.S. 123. The question before the courts of appeal in each of those cases was whether

[14] Petitioners' contention that the court of appeals rejected their confrontation claims "[w]ithout particularized analysis of the evidence in question" (Pet. No. 1047, 15) is inaccurate. As the court's opinion makes clear (see, *e.g.*, Pet. App. 37a, 38a), the court examined the record with care in considering the confrontation issue and with little assistance from petitioners, who "have made little attempt to document their claim by specific page references to the record" (Pet. App. 37a, n. 15). Petitioner's contention (Pet. No. 1047, 16, n. 1) that co-conspirator hearsay was the only evidence of Quinn's agreement to fix china prices prior to American's January 1963 increase is inaccurate. See Pet. App. 17a–21a.

[15] The disputed declaration in *Townsend* was made to a prison official while the declarant was kept in solitary confinement, and was held to be an involuntary confession. *Id.* at 327–328.

the constitutional error in the prosecution's admitted violation of *Bruton* was cured by the opportunity which each appellant had at trial to cross-examine the co-defendant. Since in each instance the co-defendant denied ever making the confession, the courts of appeal held that cross-examination was not useful and the *Bruton* error loomed too large to be harmless. *Townsend* v. *Henderson*, 405 F. 2d at 328–329; *O'Neil* v. *Nelson*, 422 F. 2d at 321–322.

By contrast, the testimony to which the petitioners now object was fully admissible against all the defendants under well-developed rules of evidence and decisions of this Court. Bonnett on direct related his conversation with Quinn in a Waldorf-Astoria hotel room; Quinn told him that he and the other conspirators had agreed to limit discounts (JA 302a–303a). This declaration was admissible against Quinn as an admission by a party, see Wigmore on *Evidence* (3d Edition), § 1048, and against his co-conspirators under traditional principles approved by this Court. *Supra*, p. 15.[16]

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[16] Petitioners' observation (Pet. No. 1047, 16) that Quinn denied this conversation with Bonnett is in essence a complaint that the jury chose to believe Bonnett, not Quinn. Petitioners' contention (Pet. No. 1047, 16, n. 2) that "prosecution witnesses were allowed to give opinion evidence without being able to recall the facts upon which their opinions were based" is without merit. Of the four witnesses to whose testimony petitioners refer, two (Quinn and Held) were *defense* witnesses; the other two, Callanan and Pierson, dealt in specifics and were subject to vigorous cross-examination. See, for example, JA 215a–224a; 228a–229a.

C. Petitioners' contention that the admission of the HCA (or Pape) notes denied their Sixth Amendment right to confrontation (Pet. No. 1047, 10–14) is unfounded. These notes, (E168–178) written by Raymond Pape on stationery of the Hotel Corporation of America ("HCA"), were found stapled together in the files of Crane Co., Pape's employer and a defendant (Pet. App. 31a). The HCA notes "echoed figures and statements" which Quinn had written on an internal American Standard worksheet dated March 1, 1963 (Pet. App. 37a; E146). These two documents were part of the government's proof that the conspirators had met on March 28, 1963, at the Palm Beach Biltmore (an HCA hotel) and had agreed on the basis of American Standard's projections, to eliminate regular enamel and fix prices on acid resistant enamel (Pet. App. 30a). Pape, the author of the notes, was seriously ill with heart disease at the time of the trial—indeed he died of heart failure shortly after the trial—and accordingly, although he was technically available to testify, the government promised not to call him if it could possibly avoid doing so (Pet. App. 31a, n. 11). The United States did not call Pape as a witness but introduced his notes instead.

The main argument [11] petitioners now advance is that the confrontation clause requires the government

[11] Petitioners also contend that in upholding the admission of the notes the court of appeals "* * * erroneously equated the right to confrontation with the hearsay rule contrary to this Court's express rejection of such an equation in *California* v. *Green*, 399 U.S. 149 (1970)" (Pet. No. 1047, 14). The

to produce a witness to testify to any fact, so long as it is incriminating and so long as the witness is literally available (Pet. No. 1047, 14). Such a position, which would exclude on constitutional grounds virtually all extra-judicial declarations of an available witness, was not accepted by this Court in *California* v. *Green*, 399 U.S. 149,[18] and is inconsistent with the recent decision in *Dutton* v. *Evans*, 400 U.S. 74. In *Dutton*, declarant was available to testify, though he probably would have claimed the privilege against self-incrimination. The prosecution did not call him to the stand and used instead a hearsay declaration; this Court found no violation of the defendant's right to confrontation. Here the government introduced Pape's written notes without calling him as a witness to avoid dangerous strain upon a man in demonstrably precarious health.[19]

Finally, we note, the Pape notes related only to the fourth aspect of the conspiracy. Even if one assumes

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court of appeals did not make such an equation. The court did hold that the notes were not hearsay (Pet. App. 38a–39a), but only in response to petitioners' arguments below that they were (Pet. App. 37a–38a). The rejection of this argument, made briefly again in this Court (Pet. No. 1047, 12), was correct. See, *e.g.*, McCormick, *Evidence* (1954), 463–466.

[18] Mr. Justice Harlan advanced a related, but less sweeping position, bottomed on due process grounds, in *California* v. *Green*, *supra*, at 186–187 (concurring). He has now rejected this prior view. *Dutton* v. *Evans*, 400 U.S. 74, 93 (concurring).

[19] Petitioners, of course, could have called Pape had they thought his testimony would be useful to them. He was, after all, an executive of a co-defendant corporation. Presumably they feared the impact of his testimony, or else they recognized what the government earlier recognized: that a man this sick should be spared the ordeal of testifying if it could possibly be done.

they pertained to some other time or place than the Palm Beach meeting, proof of the other three aspects of the conspiracy remains unimpaired. The notes would nonetheless remain cogent and proper proof of American Standard's participation in this aspect of the conspiracy. And the remaining proof *e.g.*, pp. 9–12, *supra*, would be more than adequate to establish the complicity, as well, of the other defendants.

D. The essentially related claim that the prosecutor violated his duty under *Brady* v. *Maryland*, 373 U.S. 83, by failing to produce the transcript of Pape's grand jury testimony before trial (Pet. 1047, 19–20; Pet. 1048, 7–11; Pet. 1049, 13–18) is unsound. Although petitioners filed a blanket, pretrial motion for production of "all material helpful or exculpatory" to them (J.A. 25a), the motion was withdrawn upon the prosecutor's assertion that he was aware of no such material in his possession. Never during trial did petitioners indicate specific interest in the Pape transcript. Never was the trial judge asked to review the prosecutor's judgment that this or any other document was not subject to production under *Brady*.

In their opening brief on appeal, petitioners asserted for the first time that introduction of Pape's notes without putting Pape on the stand suggested that Pape's grand jury testimony had been suppressed to conceal inconsistencies between it and the government's theory of authorship and significance of the notes. The government is satisfied that the transcript was not producible under *Brady;* we be-

lieve, moreover, that appellants gave up their right to make the claim on appeal by not affording the trial judge an opportunity to pass on their contentions in the first instance. Nevertheless, we voluntarily produced the transcript to appellants and to the court of appeals, in order to help rebut sweeping allegations of prosecutor misconduct.

Petitioners briefed and argued below their claim, renewed here, that isolated passages of the transcript contained arguably exculpatory material. The court of appeals, after consideration of the entire transcript, fully vindicated the prosecutor's judgment. It had little trouble concluding that Pape's testimony was "extremely incriminating" and contained no "material exculpatory evidence" (Pet. App. 54a). Under these circumstances it cannot be said that the prosecutor and the court below misconceived the prosecutor's responsibility under *Brady* v. *Maryland*.

III. THE DECISION BELOW CREATES NO CONFLICT AMONG THE CIRCUITS REQUIRING RESOLUTION NOW BY THIS COURT

Petitioner American Standard contends (Pet. No. 1047, 20–22) that the decision below "reflects" a conflict among the circuits concerning the proper interpretation of 28 U.S.C. 1732(a) and the weight to be given by a jury to a defendant's statements at trial and at the time he committed the crime. These contentions are erroneous.

A. American Standard offered as evidence internal company correspondence and memoranda containing

information from its field offices regarding the prices supposedly charged by its competitors (Pet. App. 42a). The trial court, however, rejected the company's claim that these were "business records" within the meaning of 28 U.S.C. 1732, and it excluded them as hearsay (Pet. App. 43a). The court of appeals sustained this ruling, holding that the reports were primarily based on information from "sources whose trustworthiness could not be ascertained from the documents themselves" and that American Standard was often not a party to the transactions that the exhibits concerned (Pet. App. 43a).[20]

In so holding, the court relied on *Standard Oil Company of California* v. *Moore*, 251 F. 2d 188 (C.A. 9), certiorari denied, 356 U.S. 975. The court said that it was "not inclined to adopt the contrary reasoning of the Sixth Circuit in *Continental Baking Co.* v. *United States*, 281 F. 2d 137, 148 (6th Cir. 1960)" (Pet. App. 43a). A careful reading of *Continental Baking*, however, reveals that the Sixth Circuit did not dispute or reject *Moore*. Rather, it distinguished that case as having been "predicated" on the lack of showing of a regular procedure for transmittal of the disputed reports about competitors; in the

[20] The court's judgment that these particular documents were untrustworthy was well grounded in fact. These "business records" were punctuated with rumors and unsubstantiated reports from undisclosed sources. See, for example, the gossipy nature of AS 61, 66, or 88 (American Standard Exhibits). Furthermore, American's own district manager, O'Connell, admitted that he received reports which contained incorrect information (T. 6066) and that he forwarded reports of competitors' activities whether or not he knew them to be true (T. 6023).

case before it, Continental "had an established policy" providing for just such transmittal. *Continental Baking Company* v. *United States*, 281 F. 2d 137, 148 (C.A. 6).[21] In so distinguishing *Moore*, the Sixth Circuit may well have interpreted it erroneously; indeed we believe the decision below reflects a sounder reading of *Moore*. But there is no dispute among the circuits concerning the central premise of *Moore*—that documents can be admissible as business records under 28 U.S.C. 1732 only if there is a basis for reasonable assurance that the information they contain is trustworthy and reliable. Thus no substantial disagreement is presented which requires resolution by this Court.

B. The court of appeals approved a jury instruction on the weight to be given to testimony of witnesses who were defendants or officials of defendant corporations and who denied entering into the illegal agreements; the court in *United States* v. *Chas. Pfizer & Co.*, 426 F. 2d 32, 40 (C.A. 2), disapproved a similar instruction.[22] We believe that the Third Circuit was

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[21] Petitioners' citation to *Hanley* v. *United States*, 416 F.2d 1160 (C.A. 5), certiorari denied, 397 U.S. 910, does not advance its argument (Pet. No. 1047, 21, n. 1). *Hanley* was based squarely on *Continental Baking* and its treatment of *Moore*. *Id.*, at 1168. The petition for a writ of certiorari denied in *Hanley*, No. 888, O.T. 1969, was based almost exclusively on the asserted conflict.

[22] The government has filed a petition for a writ of certiorari in *Pfizer*.

correct in this case. The instruction[23] was premised on the well-settled proposition that what constitutes an illegal "agreement" under the Sherman Act is a mixed question of law and fact. See, *e.g.*, *United States* v. *Gypsum Co.*, 333 U.S. 364, 396.

But this is not the case for resolution of any conflict there may be between the circuits. The court below correctly noted that petitioners failed to object to this instruction as given (Pet. App. 51a), and thus failed to preserve the issue for appeal. Fed. R. Crim. P. 30.

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[23] The trial court's full instruction on this point was as follows:

> You must, obviously, give due and deliberate thought to this testimony, and ultimately give to it such weight as it merits in your impartial judgment. In performing this task, you will have in mind the definition of a combination and conspiracy as it has been given to you in these instructions, recalling among other things, that the final answer to the central question in this case must be based upon the actual conduct of the defendants during the period covered by the indictment, and that the things the defendants did and said at the time, may in such a case be weightier than the things they say thereafter. You will take into consideration, also, that if all the elements are shown to establish a conspiracy, it would make no difference that the alleged conspirators did not believe that they were violating the law or intend to commit such a violation.
>
> This is by no means to suggest to you that you overlook or reject the sworn testimony of the corporate defendants' officers. That is for your judgment, not mine. The point being made here is that assertions of innocence by such officers may reflect partly legal as well as factual contentions and must be weighed along with all the evidence of every kind that has been submitted to you [J.A. 1954a–1955a].

IV. THE PROSECUTOR'S QUESTIONS CONCERNING THE KOHLER STRIKE DID NOT DEPRIVE THE PETITIONERS OF THEIR RIGHT TO A FAIR TRIAL

The prosecutor opened his cross-examination of petitioner Held with some questions based upon the officially-reported findings of the National Labor Relations Board, concerning the 1954 strike at Kohler Co. Held, a Kohler vice-president and director, on direct examination had not mentioned the strike, while tracing the history of the company and emphasizing its beneficence to its workers (Pet. App. 27a).[24] The court of appeals majority held that Kohler and Held had "invited some such inquiry" (Pet. App. 27a) and that Kohler's counsel had "opened the door further" by urging that another defendant's threshold objection to the cross-examination be overruled (Pet. App. 26a, 27a).[25] The court nevertheless concluded that the trial judge should have terminated the line of inquiry prior to completion because "its potential for prejudice outweighed its evidentiary value" (Pet. App. 27a). But considering the minimal impact of a brief interlude in the lengthy trial, weighed against the strength of the government's case, the majority found that the incident did not deny petitioners a fair trial (*Ibid.*).

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[24] Kohler's counsel had foreshadowed this approach in his opening statement when he emphasized Kohler's sense of responsibility as the principal employer in the county and its devotion to full employment, even at the cost of selling at a loss (JA 1603a–1604a).

[25] Indeed, the prosecutor first sought to avoid injection of these considerations into the case by unsuccessfully objecting to the entire line of examination on direct as immaterial (Pet. App. 24a; JA 1734a).

Accepting the view of the court of appeals that the cross-examination was excessive, it was on sound ground in concluding that in the circumstances the error could not have had sufficient prejudicial effect to warrant reversal. The entire episode took at most an hour of a trial that lasted sixteen weeks (Pet. App. 27a). Equally important, this bit of cross-examination took place several weeks prior to the conclusion of the trial, and, in keeping with Kohler's request, the matter was not even adverted to in the summations or the jury charge (Pet. App. 27a). The dissenting judge conceded that "what is posed is a close question" (Pet. App. 67a). The court of appeals carefully examined the place of this brief episode in the context of the entire trial and the strength of the evidence of petitioners' guilt, and concluded that the error was harmless.[25]

V. OTHER ISSUES RAISED BY THE PETITIONS DO NOT WARRANT REVIEW BY THIS COURT

Kohler challenges the jury instruction on criminal responsibility of a corporation for the acts of its agents (Pet. 1050, 3). The instruction, quoted at Pet. App. 59a–60a, was an accurate restatement of the law governing acts of agents within the scope of their

[25] The claim of petitioner Borg-Warner that it, too, was prejudiced by this episode is groundless (Pet. No. 1048, 11–12). Of course, this cross-examination never mentioned Borg-Warner, nor hinted at any involvement by it in the Kohler strike. Moreover, the trial judge clearly and carefully instructed the jury that this part of the cross-examination did not involve any defendants except Held and Kohler (JA 1749a–1750a, 1766a).

authority and the course of their employment, as the court below held (Pet. App. 58a–61a). Kohler's main claim throughout these proceedings has been that its sales manager, Held, was acting beyond his authority in making price-fixing agreements with competitors, because Kohler has a firm policy against such practice (Pet. 5–6). But it is the corporation which benefits directly from such illegal activities, and for this reason it is well settled that a corporation may not insulate itself from antitrust liability merely because its agent's activities may be contrary to corporate regulations. *Standard Oil Company of Texas* v. *United States*, 307 F. 2d 120, 127 (C.A. 5); *United States* v. *Armour & Co.*, 168 F. 2d 342, 343 (C.A. 3). A contrary rule, by affording an easy means for evasion of responsibility, would seriously weaken the deterrent effect of the antitrust laws. See *United States* v. *Uniroyal, Inc.*, 300 F. Supp. 84, 95 (S.D.N.Y.).

Kohler also complains that it was denied a fair trial by the exclusion of certain documentary economic evidence (Pet. 1050, 6–8). One exhibit purported to show pricing data outside the indictment period; Kohler's own economic expert, Dr. Beckman, conceded that studies which *were* admitted formed a sufficient basis for the conclusions to which he testified (J.A. 1527a). Another excluded exhibit purported to show some 650 discounts in excess of the agreed-upon limits; this exhibit was not only misleading (Pet. App. 44a) but also cumulative in light of substantial testimony that such discounts had been granted. (*Ibid.*; J.A. 1444a, 1454a.) Indeed, the trial judge offered Kohler an opportunity to introduce the invoices which sup-

posedly supported the exhibit (J.A. 1485a), but petitioner apparently did not think the matter of sufficient importance to do so.

Borg-Warner's contention (Pet. No. 1048, 22–25) that the court of appeals erroneously affirmed the trial court's "missing witness" charge is based on an error of fact. Contrary to petitioner's statement that "Borg-Warner had put in no case" (Pet. No. 1048, 23), Borg-Warner put in a case of its own, by introducing several exhibits (see, *e.g.*, E316) and taking a witness as its own on cross-examination in order to go beyond the scope of direct examination (JA 739). On such a record, the missing witness instruction was entirely proper. *Graves* v. *United States*, 150 U.S. 118.

Similarly without merit are Borg-Warner's accusations of improper conduct by the trial judge and the prosecutor (Pet. No. 1048, 13–14). The court of appeals examined the record with meticulous care and concluded that Judge Rosenberg had behaved with fairness through a long and wearing trial (Pet. App. 22a–23a). As to the prosecutor's closing remarks, the court held that any prejudice was insignificant in light of the trial court's corrective instructions (Pet. App. 29a–30a).

These and other arguments made in the various petitions were raised and exhaustively considered in the court below. To the extent that we have not discussed any argument, the careful and comprehensive opinion of the court of appeals affords an adequate answer.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

RICHARD W. MCLAREN,
Assistant Attorney General.

GREGORY B. HOVENDON,
JOHN C. FRICANO,
ROBERT B. NICHOLSON,
Attorneys.

FEBRUARY 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971

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FILED
FEB 18 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 1050

KOHLER CO., Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITIONER KOHLER CO.'S SUPPLEMENTAL BRIEF AND REPLY TO BRIEF IN OPPOSITION

GILBERT J. HELWIG
PAUL J. WINSCHEL
REED, SMITH, SHAW & MCCLAY
Attorneys for Petitioner

747 Union Trust Building
P.O. Box 2009
Pittsburgh, Pa. 15230

OF COUNSEL:
LUCIUS P. CHASE
Kohler, Wisconsin 53044

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 1050

KOHLER CO., Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITIONER KOHLER CO.'S SUPPLEMENTAL BRIEF AND REPLY TO BRIEF IN OPPOSITION

There are two aspects of the Government's Brief in Opposition which require response:

1. The Government misstates Petitioner's position on the issue of corporate criminal responsibility. However effective it may be, as a tactic, for the Government to raise and demolish straw man issues, for it to do so here can only obscure the question of whether this Petition presents an issue respecting the nature of corporate criminal liability on which this Court should speak.

2. The Government's Brief misstates the facts and cites to the Court portions of the record which do not support its factual assertions. The prosecutors used this tactic repeatedly in the trial below and before the Court of Appeals; that it has again appeared at this level and in a case involving charges that the Government lawyers intentionally inflamed the prejudice and bias of

the jury against the Defendants and failed to produce *Brady* material is itself a consideration relevant to a determination of whether review is here needed to enable this Court to investigate and correct a serious and apparently habitual disregard of their professional obligations by representatives of the Department of Justice.

I. THE QUESTION OF CORPORATE CRIMINAL RESPONSIBILITY.

The Government's Brief notwithstanding (p.27), Petitioner does not contend here (and did not contend below) that a corporation is immune from criminal responsibility merely because actions taken by its employee for its benefit are contrary to the employer's instructions. Kohler contended only that the violation of such instructions is a circumstance which is relevant to the question of corporate criminal responsibility for such acts.

(See Restatement *Agency 2d*, § 34, Comment g; § 228; § 229; §235, Comment (a).)

The court below refused Kohler's repeated requests to have the jury told that, among other things, it could consider the fact that such instructions had been given in deciding whether the employee's actions were authorized (Pet. 91a-96a)[1]. In contrast, the court affirmatively charged the jury that the fact that such instructions had been given was *not* a defense if the employee's acts were within the scope of his employment *or* apparent authority. (Pet. 94a) In this and in other respects, the legal and factual questions presented

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1. Reference is to Kohler's Petition for Certiorari.

by the issue of Kohler's responsibility for its employee's acts were not fairly submitted to the jury. (See Pet., pp. 5-10) In affirming Kohler's conviction, the Court of Appeals relied upon decisions of lower federal courts which sanction the imposition of criminal responsibility on corporations on evidence and under instructions which would not be tolerated by the court in cases involving the question of a corporation's civil liability for tortious acts. No decision of this Court has ever discursively reviewed the nature of corporate criminal responsibility for violations of the Antitrust Laws nor the appropriateness of the criteria which are being applied to such cases by certain of the Courts of Appeals and other lower federal courts.

In a report released on January 7, 1971 (after the Petition for Certiorari had been filed) the National Commission on Reform of Federal Criminal Laws recommended that Congress adopt, as part of a new Federal Criminal Code, a standard which would impose criminal responsibility upon a corporation only where an agent acting "within the scope of his employment" engages in conduct which is authorized, requested or commanded by persons having proper authority. In its final report, the Commission withdrew an earlier recommendation that corporate responsibility could be based upon acts done "in furtherance of its affairs on the basis of conduct . . . ratified or recklessly tolerated . . ."

(Report of National Commission on Reform of Federal Criminal Laws, § 402.)

Supplemental Brief and Reply Brief in Opposition.

The division which the report shows to exist within the Commission as to the proper standard for the imposition of corporate criminal responsibility underscores the appropriateness of this Court's granting certiorari in order to review and settle the question. The fact that the evidence in this case and the instructions given at trial would not fairly meet the standards proposed by either the majority or the minority in the report makes it clear that this case is an appropriate vehicle for such review.

II. THE FACTUAL MISSTATEMENTS IN THE GOVERNMENT'S BRIEF IN OPPOSITION.

Appellants had complained to the Court of Appeals that the attorneys for the Government breached their professional obligations of candor and fairness both at the trial and on the appeal. (See Joint Brief in Court of Appeals, pp. 188-191; Reply Brief in Court of Appeals, pp. 2-3) Aware that mere error will not, of itself, support a request for certiorari, Petitioner did not seek review by this Court of the rejection of these complaints. It appears that the Government, having succeeded with such tactics below, is pursuing them again before this Court.

Only a limited analysis of such defects can be made in a short presentation. Therefore, the misstatements of fact can only be illustrated:

Item 1: On page 7 of the Government's Brief in Opposition, the statement is made:

> "The conspirators, fearing that this increase would not hold firm, met at the Waldorf-Astoria Hotel in New York on February 7, 1963,' * * * to try to main-

> tain the new prices' (Pet. App. 12a). Petitioner *Decker*, Quinn and *Hold* were present, as were *Reich of Borg-Warner* and several other high ranking sales officials (Pet. App. 13a-14a)."
> (Emphasis added)

The underscored statement is apparently drawn from testimony concerning the persons who were present at a PPMA meeting held on February 7, 1953, rather than (as it implies) from the testimony concerning those who were present at a conspiratorial meeting which allegedly followed. No witness testified that Decker, Held or Reich was present at the conspiratorial meeting. (JA 293a, 301a-308a; KA 20a-21a; 42a-46a; 64a-65a.)[2] Held specifically denied being present, and his denial was supported by other evidence. (KA 42a.)

Item 2: In footnote 9 on p. 9 of the Government Brief, after reference to the commercial standards published by the Department of Commerce, the statement is made:

> "Since the standard is purely voluntary, it could not require the conspirators to discontinue the use of regular enameled cast iron fixtures."
> (Emphasis added)

This assertion disregards the distinction between the effect of the publication of the standard and the effect of its acceptance. As stated in the published standards themselves:

"1. Enforcement. — Commercial Standards are

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2. JA references are to the Joint Appendix on the appeals below; KA references are to the Appendix to the Kohler-Held Separate Brief on those appeals.

commodity specifications *voluntarily established by mutual consent of those concerned.* They present a common basis of understanding between the producer, distributor, and consumer and should not be confused with any plan of governmental regulation or control. The United States Department of Commerce has no regulatory power in the enforcement of their provisions, but since they represent the will of the interested groups as a whole, *their provisions through usage soon become established as trade customs, and are made effective through incorporation into sales contracts by means of labels, invoices, and the like.*

"2. The acceptor's responsibility. — The purpose of Commercial Standards is to establish, for specific commodities, nationally recognized grades or consumer criteria, and the benefits therefrom will be measurable in direct proportion to their general recognition and actual use. *Instances will occur when it may be necessary to deviate from the standard and the signing of an acceptance does not preclude such departures; however, such signature indicates an intention to follow the standard, where practicable, in the production, distribution, or consumption of the article in question.*"

(Emphasis added) [GX 539; E 158, p. 24][3]

All of the corporate Defendants were acceptors of the standard, as were dozens of distributors, users and others, including agencies of the United States. [GX 539; E 158, p. 21]

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3. E ..... reference is to documents reproduced in the Exhibits to Joint Appendix.

Item 3: In footnote 19, p. 10 of the Government Brief, the assertion is made:

> "The record shows that the conspirators had frequently discussed the need to eliminate regular enamel and to restructure the prices of acid-resistant enamel before: at the Sheraton-Chicago meeting in September, 1962 (JA 371a, 534a-535a, 477a-479a); at meetings at the Shoreham Hotel in November, 1962 (JA 435a-439a, 442a-444a, 458-459a; 524); at the Americana Hotel in New York (JA 376a-377a)."
>
> (Emphasis added)

The record references which are given do not support the assertion that there was any discussion at the Sheraton-Chicago meeting in September 1962 or at the Shoreham Hotel in November 1962 of "restructuring the prices of acid-resistant enamel." The earliest reference in the testimony to any discussion concerning the prices of acid-resistant products was to a discussion which supposedly began at a formal PPMA meeting at the Americana Hotel in December 1962 and the testimony was that the discussion was promptly halted by Mr. Quinn, who was presiding over the meeting. (JA 376a-377a.)

Item 4: In connection with its discussion of the prejudicial Kohler Strike cross-examination, the Government, in footnote 25, p. 25 represents to this Court:

> "Indeed, the prosecutor first sought to avoid injection of these considerations into the case by unsuccessfully objecting to the entire line of examination on direct as immaterial. (Pet. App. 24a; JA 1734a)."

The record does not support this contention. The facts are there was no objection by the Government to Held's brief testimony concerning the broad history of Kohler Co. (JA 1733a-1734a) The only objections in the course of this testimony was one to an earlier question about the employment at Kohler of other members of Held's family (JA 1731a-1732a) and a later objection to a question concerning the acquisition by Kohler of a plant at Spartanburg, South Carolina in the early 1960's, which was after the Kohler Strike had ended. (JA 1733a-1734a) The assertion by the Government that it sought to avoid injection of the considerations into the case by unsuccessful objections is a flat misstatement of the record. By the time the Government made the objection to which the Court is cited, the testimony referred to had already been given *without objection*. (JA 1734a)

Item 5: On p. 26 of the Government Brief, the Government asserts concerning the Kohler Strike references:

> ". . . in keeping with Kohler's request, the matter was not even adverted to in the summations or the jury charge . . ."

While it is true that the Kohler Strike was not adverted to in the summations, this was not "in keeping with Kohler's request." At the close of the case, Kohler asked the court for a ruling that no counsel should refer to the strike in his closing argument, but the Government opposed the request and the court declined to grant it. In the course of the discussion of the request, the Government expressly threatened to bring up the pre-1960 strike in its closing if Kohler, in its closing, should refer to the evidence concerning the Company's need to main-

tain a steady level of employment in the period after September 1962, long after the strike had ended. (T 9503-9511)[4]

A candid statement of the matter by the Government would have been that the Kohler Strike issue was not referred to in the closings only because Kohler had been intimidated by the Government's blackmail threat to reinject this inflammatory issue into the case if Kohler should argue to the jury that its business interests in the period of the alleged conspiracy required that it maintain a high sales volume, and therefore that its interests could not have been served by an agreement which might tend to restrict its competitive activities.

* * * *

In addition to the misstatements of fact which are illustrated above, the Government, in its efforts to support the lower court's erroneous conclusion that the evidence of Defendants' guilt was "compelling" and "overwhelming", overstates the facts, frequently omitting significant testimony which should be considered in determining whether the totality of the evidence in favor of guilt was "overwhelming."

Much is made of the fact that Kohler, for example, later published prices which allegedly were discussed or agreed upon at the various gatherings referred to in the testimony. The evidentiary value of Kohler's subsequent publishing of these prices, however, can be fairly evaluated only in the light of the following testimony, to which no reference is made:

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4. Reference is to the transcript of testimony at the trial. The relevant portions of this colloquy — which does not appear in the Appendices on Appeal — is printed in the appendix to this Brief. (infra, pp 14-16.)

1. Persons with authority to determine Kohler's published prices had no knowledge of Held's having met with its competitors or of there having been any such discussions of prices with its competitors. [KA 39a-41a; 89a-93a; 96a-100a; 106a; JA 151a-55a]

2. The prices published by Kohler were subsequent not only to the alleged conspiratorial gatherings, but were subsequent also to the announcement of price changes by its largest competitor, American Standard.[5] [GX 401, E-100; GX 403, E-104; GX 405, E 108; GX 407, E 112; GX 409, E 116; GX 411, E 120; GX 413, E 124; GX 415, E 128; GX 417, E 132; GX 419, E 136; GX 421, E 140; GX 423, E 142; GX 426, E 144]

3. The price moves of the indicated manufacturers were neither simultaneous nor identical, notwithstanding their being treated as such by the Court of Appeals and by the Government in its argument to this court. The dates of the various announcements of the changes in published prices span anywhere from a few days to several months, as is shown by the Government Exhibits referred to above. Moreover, only a few high volume items were offered by the companies at identical prices. Thus, the prices in the Kohler price book published in February 1963 had prices ranging from 18% below American Standard's to 10% above. (KA 98a) Of all

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5. Richard McLaren, head of the Antitrust Division of the Dept. of Justice, and one of the attorneys on the Government's Brief, was quoted in the October 1969 *Dun's Review* as having said in an interview that he saw nothing "peculiar or significant in the fact that one company raised prices and the others followed . . . In an industry where you have a very similar product, sort of a basic product without style or trademark features, its more or less unusual to have different list prices."

the items listed in this catalog, which numbered into the hundreds, there was only one identical price. (EA 99a) Kohler and its competitors ez would be expected, had similar prices on some items, but even on these, prices actually received were "all over the lot." (EA 138a-39a; 153a-55a; 168a-69a)

A further illustration of the Government's unfairly adding to the testimony of a witness deserves comment:

According to the Government's theory, the conspiracy began at a cocktail party held in a hotel room at the Sheraton-Chicago Hotel on September 17, 1962, on the evening before a PPMA meeting. The testimony was that this was a social affair with men gathering in small moving groups, engaged in a variety of small talk. (JA 80a-81a, 91a, 127a-128a, 157a) The affair lasted several hours (JA 91a) and Held was the last to arrive and the first to leave. (JA 159a)

The Government's witness Callanan testified that there was some discussion of increased bath tub prices during the course of the evening. (JA 78a-85a) In the course of this testimony, Callanan was asked whether Held participated in the discussions and answered:

> "I don't remember Mr. Held talking, but he was there listening."
>
> (JA 79a)

In using this testimony in its brief below, the Government felt constrained to add the phrase "to them" to Callanan's answer.

This editorial addition was adopted by the Court of Appeals which stated in its Opinion,

> "... although Callanan could not recall specific

> statements by each attendee, he did testify that Defendant Keich (Borg-Warner) participated in price discussions and that Appellant Held (Kohler) 'was there listening' to them." (Pet 9a)

While it can certainly be argued that it is a permissible inference that because Held was present and "listening" during some part of this long gathering, he was "listening" to the price discussions which Callanan said had occurred. Callanan, however, did not say this, at most it is an inference. Fairness requires that the Government explicitly reveal when it has thus enlarged a witness' testimony by adding to it matters to which he has not testified but which the Government contends may be inferred. *Re Greenberg* (1954) 15 N. J. 132, 104 A2d 46, 47.[6]

Petitioner wants to make it clear that it is not arguing the sufficiency of the evidence to support a finding of guilt. The point is that in arguing that the errors found by the court below should be disregarded as "harmless error," the Government relies heavily upon its contention that the evidence of Petitioner's guilt was "overwhelming." In making this argument, it is wrong for the Government totally to disregard the mass of evidence favorable to Defendant. No fair evaluation of the relative weight of the evidence for and against guilt can be made by weighing only that evidence favorable to guilt. Moreover, the Government's evaluation of the evidence is additionally distorted by the Government's penchant for stating the evidence more favorably to the

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6. Mr. Justice Brennan was a member of the Supreme Court of New Jersey which decided this case.

Government than the testimony warrants. Inquiry into the questions which are before this Court in this and its companion petitions requires that the Court be given an evaluation of the facts which is "exactly and fairly stated." *Stubbs v. California* (1959) 362 U.S. 165, 172.

If the doctrine of "harmless error" is to be applied here, the scales of justice should bear the label "honest weight".

Respectfully submitted,

GRAMER J. SHAW
PAUL J. WINKLER
REID, SMITH, SHAW & MCCLAY
Attorneys for Kohler Co.

Of Counsel:
LUCIUS P. CRANE
Kohler Co.
Kohler, Wisconsin

APPENDIX

(from transcript of proceedings at trial)

* * * *

[9503] *Mr. Helwig*: I have handed to the Court, I believe — I have handed to the clerk—

The Court: I am coming to that next. You may make a motion with reference to the Kohler strike, but I want to see if anything else is desired.

I would be very happy if we could arrive at some understanding or some feeling that nobody is being deprived of rights.

Go ahead, Mr. Fricano.

Mr. Fricano: I think that is entirely up to Mr. Helwig, your Honor. The United States did not inject this aspect in this case. This was done by Kohler Company and by Mr. Held.

Accordingly, if upon summation Mr. Helwig and Mr. Unkovic feel it desirable, as apparently they did during their case, to leave the door open to something like this, [9504] then I think it quite fair that the United States can comment upon it.

The Court: I think that is more or less your answer. If you say anything about it, he will.

Mr. Helwig: Of course, I will not make any explicit reference to the Kohler strike, your Honor, or to any interrogation or any other matter about it. I think though, that there is an ambiguity in the present state of our consideration, which is implicit in Mr. Fricano's statement that we brought the matter out.

* * * *

[9507] *Mr. Helwig*: So that all counsel will know, Your Honor, I represent to the Court, and to all counsel, that the Kohler Company does not intend to make, and will not make, any reference to the strike, or any matter related thereto in its closing argument.

The Court: There you are, Mr. Fricano.

Mr. Helwig: I don't want to be misunderstood on this. This is without restriction to the possibility that Kohler Company may refer in its summation or argument to the interest of the Kohler Company in steady and level employment in the period between September, 1962, and 1966. I haven't decided one way or the other on that.

So there is no ambiguity, I wanted to make it clear that if I do that, I would not consider it to be inconsistent with the representation I am making now.

* * * *

Mr. Fricano: With respect to Mr. Helwig's last point concerning his judgment as to whether or not he will pursue that line of argument before the jury, that is to say, Kohler Company's interest in keeping a level [9508] and steady employment in the indictment period, it is our judgment that is one of the principal grounds upon which the door to the Kohler strike was opened.

They have contended throughout this case, as they did through Dr. Beckman, that they were selling below cost. One of the reasons they were selling below cost was to make sure their employees as to which they had a tremendous responsibility in Sheboygan, Wisconsin — that is way up north some place — could be maintained.

I respectfully submit, Your Honor, that if Mr. Helwig goes into this area, that the door is wide open.

Mr. Helwig: If the Court please, if that occurs, and there is a conviction, we will be in the Court of Appeals on that point.

The Court: Mr. Helwig, you are going to be in the Court of Appeals in any event, if there is a conviction.

Mr. Helwig: That is right, Your Honor.

The Court: It doesn't make any difference then. The Court of Appeals will have one more point, that is all.

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